92-1992

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE HAROLD WASHINGTON PARTY, ET AL.,

Plaintiffs-Petitioners,

vs.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, ET AL.,

Defendants-Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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(a)

THE QUESTIONS PRESENTED FOR REVIEW

The Questions Presented For Review are:

(1) Because the district court failed to give the classes notice of the pendency, the conduct, and/or the proposed dismissal of plaintiffs-petitioners' class action complaint, as required by Rule 23 of the Federal Rules of Civil Procedure, did not the district court therefore err in dismissing plaintiffs' class action complaint?

(2) Did not the court of appeals' avoidance of resolving and refusal to decide the validity or invalidity of the district court's dismissal of plaintiffs-petitioners' class action complaint, because of the district court's failure to notify the classes of the pendency, conduct and proposed dismissal of plaintiffs-petitioners' class action complaint, err and so far depart from the accepted and usual course of judicial proceedings, as to call for an exercise of this Courts' power of supervision?

(3) Because the district court had not ordered plaintiffs-petitioners' attorney to file a response to the defendants' stock motion to dismiss plaintiffs' complaint, did not the district court lack authority to dismiss, and err in dismissing plaintiffs-petitioners' complaint under Rule 41(b) of the Federal Rules of Civil Procedure, because of plaintiffs-petitioners' attorney's failure to file such response?

(4) Because plaintiffs-petitioners' complaint clearly and unquestionably alleged a cause of action against the defendants, and, because the defendants' perfunctory motion to dismiss plaintiffs' complaint was manifestly

THE QUESTIONS PRESENTED FOR REVIEW – Continued

frivolous, and, because of the totality of the unique facts and circumstances involved, did not the district court err in refusing to rule on the merits of the dismissal motion, and abuse its discretion in dismissing plaintiffs' complaint, thereby denying to plaintiffs their day in court, instead of imposing sanctions against plaintiffs-petitioners' attorney for his failure to file a response to the defendants' dismissal motion?

(5) In acknowledging in the case at bar that "the facts in this case are not as egregious as some", and then deny relief and refuse to follow [**SOME** of] its own precedents in which the facts were far more egregious and in which relief was granted, Passarella v. Hilton International, 810 F.2d 674 (1987); Dormeyer Co. v. M.J. Sales, 461 F.2d 1202 (1984), did not the court of appeals err and so far depart from the accepted and usual course of judicial proceedings, and so flagrantly conflict with that court's own aforementioned decisions as to call for an exercise of this Court's power of supervision?

(b)

THE LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED:

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed are: The Harold Washington Party, Plaintiff, Appellant, Petitioner vs. The Cook County, Illinois Democratic Party, Thomas Lyons, individually and in his official capacity as Chairman of the Cook County, Illinois, Democratic Party, Tom Carey, Michael Carey, Michael Sheahan, Ray Simmon, Bonnie McGuire, Valerie A. Sutton, Patton L. Feichter, Ervin S. Picke, David Barrera, Dorothy Reed and unnamed co-conspirators, Defendants, Appellees, Respondents.

(c)

TABLE OF CONTENTS

Page

a. The Questions Presented for Review.....i

b. The List of Parties to the Proceedings..... ii

c. Table of Contents and Authorities.....iv

d. Official and Unofficial Reports of Opinions..... 1

e. Jurisdictional Statement..... 1

f. The Federal Rules of Civil Procedure Involved.... 2

g. Statement of the Case.....5-21

i. Basis for Federal Jurisdiction in the Court of First Instance.....21

j. Argument for the Allowance of the Writ.....22-30

App. Page

k. Appendix

Court of Appeals Opinion Sought to be Reviewed .....App. 1

Memorandum Opinion of the District Court..App. 14

Order Denying Petition for Rehearing.....App. 18

The Harold Washington Partys' Complaint vs. The Cook County Illinois Democratic Party, et al. .....App. 20

TABLE OF AUTHORITIES

Page

C.K.S. Engineers v. White Mountain Gypsum, 726 F.2d 1202 (1984) 28, 29

Dormeyer Co., v. M.J. Sales, 461 F.2d 40 (1972) ... 28, 29

Ellingsworth v. Chrysler, 665 F.2d 180 (1981) 28, 29

Passarella v. Hilton International, 810 F.2d 674 (1987) 28, 29

Stevens v. Greyhound Lines, Inc., 710 F.2d 1224 (1983) 27, 28, 29

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23 ..... 2, 24, 25, 28

Rule 41(b) 4, 26, 28

Rule 60(b) 4

(d)

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

The district court's memorandum opinion denying Plaintiff-Petitioner, the Harold Washington Party's motion to vacate the order dismissing its complaint is not reported, but is set forth at Appendix 20.

The decision of the court of appeals affirming the district court's order dismissing the complaint and denying petitioner's motion to vacate the dismissal order is reported in 984 F.2d 875 and is set forth at Appendix 1.

(e)

JURISDICTIONAL STATEMENT

The grounds on which the jurisdiction of this Court is invoked are:

(i)

The date of the entry of the judgment sought to be reviewed is January 29, 1993.

(ii)

The date of the order denying the petition for rehearing is March 17, 1993.

(iii)

[Inapplicable]

(iv)

The statutory provision which confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28 USC Section 1257.

(f)

THE FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Federal Rules of Civil Procedure involved are as follows:

"Rule 23. Class Actions.

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

* * *

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

* * *

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

* * *

(D) **Orders in Conduct of Actions**. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the

opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; * * *

* * *

(e) **Dismissal or Compromise.** A class action shall not be dismissed or comprised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

"Rule 41. Dismissal of Actions

* * *

(b) Involuntary **Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action against the defendant. * * *

* * *

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

"Rule 60. Relief From Judgment Or Order.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

* * *

or (6) any other reason justifying relief from the operation of the judgment. the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . . "

STATEMENT OF THE CASE

The uncontradicted and admitted facts, alleged in plaintiffs-Petitioners' complaint, are as follows:

Plaintiffs-petitioners', The Harold Washington Party (HWP), Barbara Norman, Timuel Black, Fannie O'Bannion and O.B. Roberts, (a HWP (1) candidate, (2) nomination petition signer, (3) supporter and voter, and (4) petition circulator, respectively), filed their class action complaint in the instant cause on October 1, 1990. The complaint named as Defendants-Respondents the Cook County, Illinois Democratic Party, its chairman Thomas Lyons, its attorneys Michael Carey and Ray Simmon, its candidate for Cook County Sheriff, Michael Sheahan, and its supporter-employee, Bonnie McGuire, and the five objectors, Sutton, Feichter, Ricks, Barrera and Reed, to the HWP nominating petitions before the Cook County Officers Electoral Board [CCOEB] to remove the HWP and the HWP candidates from the November 6, 1990, Cook County Illinois general election ballot. The complaint alleged that the defendants-respondents engaged in an illegal conspiracy to keep the HWP and its candidates off said ballot. The complaint further alleged that the defendants-

> respondents committed various specified illegal-criminal acts hereinafter set forth, in furtherance of their illegal conspiracy, in violation of plaintiffs-petitioners' 1st, 14th and 15th Amendment constitutional rights, privileges and guarantees. The complaint sought actual and punitive money damages and plaintiffs demanded trial by jury.

The complaint is completely set forth herein as Appendix IV, Appendix 20.

The undisputed and admitted specific and detailed facts, alleged in plaintiffs-petitioners' complaint, are as follows:

Plaintiff-Petitioner, the Harold Washington Party (HWP), is a new, struggling political party in Chicago, Cook County Illinois, established in 1989, in part, out of the death of Chicago Mayor Harold Washington in November, 1987, and the repeated insults, disrespect, indignities and the denial of reciprocal and parity political benefits and empowerment to voters by the Chicago, Cook County Illinois Democratic Party, to which many, perhaps most of the HWP members formerly belonged.

The HWP on August 6, 1990, filed its nominating petitions to have its therein named candidates for the Cook County, Illinois offices of Sheriff, States Attorney, Assessor, Clerk, Treasurer, Board President and other offices placed on the November 6, 1990, Cook County, Illinois general election ballot. The HWP nominating petitions contained over 60,000 signatures of Chicago, Cook County, Illinois registered voters.

The Chicago, Cook County Democratic Party and its officials, [CCCDP], Defendants-Respondents, repeatedly and publicly proclaimed that they and the CCCDP had no objection to and would not oppose or interfere with the HWP and its candidates being on the Cook County

November 6, 1990, ballot. These CCCDP public proclamations were false and deliberately designed to deceive the public. Defendants-Respondents, CCCDP, and its officials clandestinely and surreptitiously engaged an attorney to represent five innocuous CCCDP members who were Chicago, Cook County voters, Defendants-Respondents Sutton, Feichter, Ricks, Barrera, and Reed to file objections with the Cook County Officers Electoral Board [CCOEB] to the HWP nominating petitions and its candidates to remove the HWP and its candidates from the November 6, 1990, ballot.

On August 13, 1990, the attorney for the five objectors-respondents filed their verified objections to the HWP nominating petitions and 6,000 "appendix recapitulation" sheets of the HWP nominating petitions signatures, in support of their objections. The respondent-objectors alleged under oath that the HWP nominating petitions "contained forgeries, illegal, improper, non-genuine signatures and unregistered voters", and were illegal. The objectors prayed that the HWP and its candidates be removed from the ballot.

The respondents-objectors' 6,000 "appendix recapitulation" sheets, numbered 1 to 6,000, ostensibly specified the alleged defects of illegal, improper, non-genuine signatures and signatures of unregistered voters and forgeries as to every one of the 60,000 signatures on the corresponding numbered 1 to 6,000 HWP nominating petitions. The HWP pointed out to the Cook County Officers Electoral Board (CCOEB), before which the objections were filed and were pending for hearing and disposition, that the objectors' 6,000 "appendix recapitulation" sheets were obviously and flagrantly fraudulent, in that all the 6,000 "appendix recapitulation" sheets were the same – exact – duplicate – photocopies of one original, and that it would be impossible for all the 60,000 HWP

signatures to have the identical defects. By reason thereof, the HWP moved the CCOEB to dismiss the objectors' fraudulent objection that the HWP nominating petitions signatures were irregular and invalid, on which the CCOEB conducted an evidentiary hearing.

At this evidentiary hearing, respondent, objectors called Bonnie McGuire as their witness before the CCOEB. During her testimony, the CCOEB chairman found it necessary to repeatedly advise and admonish McGuire of her constitutional rights to an attorney and warned her against self incrimination, and she frequently interrupted her cross examination to consult and confer with her attorney.

McGuire's uncontradicted direct and cross examination testimony positively established, inter alia, that the objections to the HWP nominating petitions were filed at the clandestine and sneaky instigation, behest, request, and on behalf of the CCCDP officers, Defendants-Respondents, Thomas Lyons, Ray Simmon, Tom Carey, Michael Carey and others, and that they were the real objectors to the HWP nominating petitions, not the five innocuous voters respondents-objectors.

McGuire testified that she knew that the Cook County Democratic Party leaders did not want and opposed the HWP and its candidates being on the November 6, 1990 election ballot. She further related that Respondent, Tom Carey, Administrative Aid to Cook County Democratic Party Chairman, Defendant Thomas Lyons, purchased with over $1400 of Democratic Party funds, photocopies of the HWP nominating petitions from the Election Board and delivered them to Chairman Lyons at the Democratic Party headquarters on LaSalle Street in downtown Chicago, on August 7, 1990.

McGuire requested and Lyons furnished her with photocopies of the HWP petitions, Chicago Poll Sheets

and a Key Book, which were picked up by one of McGuire's sons at Lyons' Cook County Democratic Party headquarters office.

McGuire further testified that she, with others under her supervision, at random, checked some of the HWP nominating petitions and prepared recapitulation sheets of her examinations. These McGuire "appendix recapitulations" sheets are different from and are not the additional 6,000 fraudulent photostatic copy "appendix recapitulation" sheets herein before and after mentioned.

McGuire related that for each HWP nominating petition and recapitulation sheet, that is, for every HWP nominating petition signature that she examined, she indicated on every corresponding recapitulation sheet thereof, that the "signature [was] not proper person and [was] not genuine", even though she admitted that she had absolutely no factual or evidentiary basis therefore. McGuire confessed that her HWP nominating petition recapitulations, "Signatures not proper person and not geniune", were inaccurate, incorrect and false, and were known by her to be so. McGuire related that she knowingly, falsely stated in her recapitulation sheets of the HWP nominating petitions that all of the signatures she examined on the HWP nominating petitions were "not the right person and not genuine" after she called and talked to Defendant-Respondent, Attorney Michael Gary and he told her to do so.

McGuire testified that on Monday, August 13, 1990, she took the HWP nominating petitions and her recapitulation sheets thereof to the downtown law office of Defendant-Respondent Attorney Ray Simmon, the attorney for the Cook County Democratic Party and campaign chairman of Democratic Party Illinois gubernational candidate Neil Hartigan in the November 6, 1990 general election.

McGuire discussed with Attorney Simmon the HWP nominating petitions and her recapitulation sheets thereof. While in Simmon's office, McGuire testified that she saw an additional 6,000 "appendix recapitulation" sheets of the HWP petitions, hereinbefore mentioned and which the HWP contended were fraudulent. McGuire acknowledged that these 6,000 Simmon, "appendix recapitulaiton" sheets were exact, duplicate, photocopies and that their page numbers corresponded to the HWP petition numbers. McGuire additionally acknowledged that each of the 6,000 Simmon "appendix recapitulation" sheets stated that all 60,000 of the HWP nominating petition signatures, the "Signer [was] not registered at address shown", and "Signatures [were] not proper person and [were] not genuine."

McGuire related that pursuant to Attorney Simmon's directions, she went to the law office of the five objectors' attorney and turned over to him the recapitulation sheets prepared by her.

The McGuire "appendix recapitulation" sheets prepared by McGuire, and the 6,000 Simmon "appendix recapitulation" sheets which McGuire saw in Attorney Simmon's office and which the HWP contended were fraudulent photocopies, were filed with the Cook County Officers Electoral Board, in support of the respondents-objectors' verified objections to the HWP nominating petitions.

Plaintiffs-petitioners' complaint further alleged that:

Upon conclusion of the evidentiary hearing and arguments of counsel, the CCOEB rendered its written findings and decision, which overruled the objectors' objection that the signatures on the HWP nominating petitions were illegal forgeries, etc., and sustained the

HWP motion to strike and dismiss this objection. The CCOEB found, and ruled, inter alia:

> "The objectors filed objections to all 60,000 City/County HWP signatures on the basis that the signatures were not signed in the voter's own proper persons and that the signers were not duly registered voters. The objectors filed 6,000 **"APPENDIX RECAPITULATION"** sheets corresponding to the sheets of the HWP petitions, on which an X was marked in each box corresponding to these allegations. In fact, the **Board finds from the evidence presented that the appendix recapitulation sheets were photocopies from a "master sheet". The objector's contention that every one of the signatures filed by the HWP was invalid strains credulity. Even in the most blatant cases of petition fraud, some signatures will be valid.** The candidates themselves can be presumed to have signed their own petitions.
>
> Bonnie McGuire testified that she . . . reviewed a small sampling of the HWP petitions against February, 1990 pool sheets. She also testified that no signatures were checked against the permanent binder cards to determine if the signature was not, in fact, the signature of whom it purported to be. She prepared these objections and tendered them to a Mr. Michael Carey and Mr. Ray Simmon. **Mr. Carey instructed her to insert additional objections so that every signature was objected to under the designation "Not Signed In Own Proper Person".** Mrs. McGuire rightfully questioned this practice, since her limited, though thorough review had only resulted in the smaller number of objections she listed. **Mrs. McGuire testified that Mr. Casey insisted that the additional signatures**

should be objected to so as to "preserve the objection for the record".

Mrs. McGuire also testified that she met the objectors only briefly at Raymond Simmon's office. She explained her research to one of the objectors. Some of the objectors were not even present. Obviously, there was no way for these objectors to have obtained the information relevant to their objections other than through Mrs. McGuire. However, these objectors swore under oath that the objections were true. This lack of knowledge of the nature and accuracy of the objections gives the Board even more reason not to order a binder check. The objectors presented no evidence which would substantiate the [objectors'] allegations [that the signatures on the HWP nominating petitions were invalid, etc.] or shift the burden to answer to the HWP". (Emphasis added.)

Plaintiffs-petitioners' complaint concluded that "the defendants-respondents' aforesaid acts and conduct, clandestine and overt, legal and illegal, fraudulent and malicious, individual and conspiratorial were willfully, wantonly, wickedly and maliciously committed by defendants-respondents to improperly and illegally prevent the HWP and its candidates from being on the Cook County, Illinois November 6, 1990 general election ballot . . . " and prayed for compensatory and punitive money damages against defendants-respondents.

The CCOEB ordered the HWP and all its candidates for Cook County offices, except suburban Cook County Board and Water Reclamation candidates, placed on the November 6, 1990 Cook County, Illinois general election ballot.

Appellate review of the CCOEB decision

Respondents-objectors appealed and the Circuit Court of Cook County reversed the CCOEB and ordered the HWP candidates removed from the ballot. The Illinois Supreme Court affirmed the Circuit Court's removal of the HWP candidates from the ballot. This Court granted Petitioners' Petition for a Writ of Certiorari, on October 26, 1990 stayed the decision of the Illinois Supreme Court and ordered the HWP candidates placed on the November 6, 1990, Cook County Illinois general election ballot. On January 14, 1992, this Court rendered its decision upholding the decision of the CCOEB. This Court's decision affirmed in part and reversed in part the decision of the Illinois Supreme Court and remanded the cause to that court for it to interpret and determine the constitutional validity of the full slate requirement of the Illinois Election Code. This decision of this Court is reported in Norman [HWP] v. Reed, 502 U.S. ___, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992).

The Illinois Supreme Court on remand rendered its decision in which it refused to decide the constitutional validity of the full slate requirement of the Illinois Election Code and Petitioner HWP, on April 30, 1993, filed in this Court its second petition for a writ of certiorari to review and reverse that Illinois Supreme Court decision. This petition is presently pending before this Court, Norman [HWP], Petitioners, vs. Reed, et al., Respondents, No. 92-1739.

The proceedings in the district court on plaintiff-petitioner's conspiracy complaint

The pre dismissal proceedings

The complaint which alleged, as stated, an illegal conspiracy by the defendants-respondents to keep the HWP and its candidates off the November 6, 1990 ballot, was filed on October 1, 1990. The district court on October 23, 1990 granted defendants-respondents an extension to November 26, 1990 within which to answer or otherwise plead to the complaint.

On October 23, 1990, plaintiffs-petitioners' attorney, R. Eugene Pincham, was in Mercy Hospital in Chicago recovering from emergency appendectomy surgery, performed on October 16, 1990, due to a mammoth ruptured appendix, and he was therefore unable to appear in court on October 23, 1990. Two young lawyers who had agreed to assist Attorney Pincham without fee appeared for Attorney Pincham. The district judge set the cause for status for December 3, 1990.

On October 30, 1990, the district judge granted the motion of Defendant-Respondent, Bonnie McGuire to extend the time within which to answer or plead to plaintiffs' complaint to November 30, 1990.

The defendants-respondents filed their motion to dismiss plaintiffs-petitioners' complaint on November 13, 1990.

It was patently clear that the defendants' motion to dismiss plaintiffs' complaint on the merits was frivolous and had no merit whatsoever. The defendants' dismissal motion fallaciously asserted that plaintiffs' complaint should be dismissed because (1) "No fraud was committed," (2) "the claim of fraud is barred by the doctrine of res judicata," (3) "the fraud never formed any basis for any state court ruling which refused to allow the HWP

and its candidates to appear on the ballot for the November 6, 1990 general election," (4) "this case is moot by reason of the order of the United States Supreme Court entered October 25, 1990 which placed the HWP and its candidate on the November 6, 1990 election ballot", (5) "plaintiffs suffered no injury," and (6) "the complaint fails to set forth sufficient facts to support either a claim of fraud or a claim of conspiracy".

The allegations of plaintiffs' complaint on their face, refuted each of these contentions of the defendants. In fact, the foregoing defendants' contentions 1 through 5 were themselves facially ludicrous and prima facie absurd. Moreover, the detailed and specific factual allegations of plaintiffs' complaint, undenied and admitted by the defendants' dismissal motion, affirmatively established an illegal conspiracy by the defendants and the defendants' commission of overt illegal and criminal acts pursuant to and in furtherance of that illegal conspiracy to remove plaintiffs, the HWP and its candidate from the Cook County November 6th ballot, in violation of plaintiffs' 1st, 14th and 15th Amendment constitutional rights. The defendants' motion to dismiss plaintiffs' complaint was so trivial and ill founded that it did not merit a response.

Attorney Pincham was again in Mercy Hospital recovering from massive hernia surgery performed on November 26, 1990, when the cause came on status call on December 3, 1990. Another attorney again answered the status call on behalf of Attorney Pincham, at which time defendants-respondents' attorney "ask[ed] the court today to give the plaintiff time in which to respond [to our dismissal motion] and to set a time for us to file a reply". The clerk stated: "the answer to the motion is due January 2, 1991; the reply January 16, 1991 and ruling February 15, 1991".

Pursuant to written notice, motion and suggestions of Attorney Pincham's continued illness, served on defendants' attorney on January 4, 1991, the district court on January 11, 1991 granted plaintiffs-petitioners' motion to extend the time for plaintiffs to respond to defendants' motion to dismiss to January 18, 1991, reply due February 1, 1991 and ruling set for March 7, 1991.

Attorney Pincham filed on January 23, 1991 a written motion to extend the time for filing plaintiffs' response to the defendants' motion to dismiss plaintiffs' complaint. The suggestions in support of the extension motion recited that defendants' dismissal motion fallaciously contended that plaintiffs' complaint did not allege a cause of action, that "Plaintiffs have a good and meritorious claim and cause of action against the defendants, and defendants' motion to dismiss plaintiffs' claim and complaint is without merit and ill-founded, as will be clearly, convincingly and persuasively demonstrated and established by and in plaintiffs' attorney's response to said dismissal motion". The suggestions in support of plaintiffs' motion for an extension additionally recited that plaintiffs' response had not been prepared because of Attorney Pincham's illnesses and hospitalizations in Mercy Hospital August 3 to August 17, October 16 to October 23, November 25 to December 3, 1990 and his delayed recuperation from said illnesses.

Plaintiffs-petitioners' motion for an extension came on to be heard on January 28, 1991, at which time, pursuant to the courts' inquiry, Attorney Pincham advised the court that his health was not "what it ought to be". Respondents' attorney objected to granting Attorney Pincham's motion for an extension of time for plaintiffs to respond to the defendants' dismissal motion, pointing out that there were other attorneys for plaintiffs in the case. Attorney Pincham advised the court that the case

was a pro bono case and that "the other lawyers in the case were really attempting to aid and assist me during the time when we were in the midst of a [November 6, 1990 Cook County election] campaign," and during his illnesses, hospital stays and extended recuperating periods. The court granted the motion of plaintiffs-petitioners for an extension to March 1st, upon advising respondents' attorney that, "If the case was improvidently brought, then you will get relief . . . you are, in the last analysis, not going to be fundamentally prejudiced by that." The court set ruling on the dismissal motion for April 17, 1991.

The day before the March 1st date on which plaintiffs' response to the defendants' motion to dismiss was to be filed, on February 28, 1991, plaintiffs' attorney, R. Eugene Pincham conceded to the HWP's plea to be the partys' mayoral candidate in the Chicago April 2, 1991 mayoral election. Because of his efforts in that regard, coupled with his efforts on behalf of Danny Davis' mayoral campaign in the Democratic Party February 26, 1991 primary election, his illnesses and recuperations, Attorney Pincham was unable to prepare and file plaintiffs' response to the defendants' motion to dismiss plaintiffs' complaint by the March 1, 1991 date. The defendants' capitalized on plaintiffs' attorney's predicament by filing on April 5, 1991 their motion to dismiss plaintiffs' complaint, "Because of the plaintiffs' failure to file any memorandum in opposition to the [defendants'] motion to dismiss . . . "

The dismissal proceedings

Upon presentation on April 5, 1991 of the defendants' motion to dismiss plaintiffs' complaint because of plaintiffs' failure to file a response to the defendants' motion to dismiss plaintiffs' complaint on the merits, defendants'

attorney additionally urged that "this is a frivolous lawsuit". Attorney Robert Pincham on behalf of plaintiffs-petitioners responded:

> "Well let me start with the last point first, if I may. There is nothing whatsoever frivolous about our law suit. Clearly, there was a period of time when lead counsel [R. Eugene Pincham] in this case was ill. He came before the court and made such representations to you. The matter was set down for another date. As the court is well aware, R. Eugene Pincham, Sr., has been very publicly involved in other activities in recent days. **If the Court will allow me fourteen days, I will have a response in here" (Emphasis added.)**

The district judge denied his request for a brief 14 day extension within which to file plaintiffs' response, stating:

> "I don't mean to short change anybody on the merits of this case, but if it was the first time, I would understand it. But it is now the second time . . . "

Thereupon, the district judge dismissed plaintiffs' complaint with prejudice because of plaintiffs' failure to have filed a response to the defendants' dismissal motion. The district judge did not rule on defendant-respondents' motion to dismiss plaintiffs-petitioners' complaint on the merits of the deficiency or sufficiency of the complaint.

The post dismissal-motion to vacate proceedings

Promptly after entry of the April 5, 1991 dismissal order, plaintiffs' attorney, R. Eugene Pincham, on April 22, 1991 presented to the court (1) plaintiffs' written motion to vacate the April 5, 1991 dismissal order, (2) plaintiffs' attorney's affidavit in support of plaintiffs'

motion to vacate the April 5th dismissal order, (3) plaintiffs' answer and response and memorandum to defendants' motion to dismiss plaintiffs' complaint on the merits of the complaint. Plaintiffs' attorney's affidavit in support of plaintiffs' motion to vacate stated, inter alia, that plaintiffs' attorney was unable to file plaintiffs' response to defendants' dismissal motion on or by March 1, 1991, arising out of the following facts and circumstances:

On November 25, 1990, twelve days after defendants filed their dismissal motion on November 13, 1990, plaintiffs' attorney R. Eugene Pincham, entered Mercy Hospital, the third time in four months, for hernia surgery, which was performed the following day, November 26, 1990; and plaintiffs' attorney was confined in Mercy Hospital until December 3, 1990, and thereafter continued to recuperate at his home. By reason thereof other attorneys appeared in the cause before the court on behalf of plaintiffs' recuperating attorney. During his recuperation, plaintiffs' attorney was requested to aid and assist Danny Davis in his quest for the Democratic Party mayoral nomination in the February 26, 1991 primary, and plaintiffs' attorney diligently served in that capacity as a surrogate speaker, etc. to the extent that he was physically able. Upon Danny Davis loosing said primary campaign, the Harold Washington Party requested plaintiffs' attorney to become the HWP candidate in the Chicago mayoral April 2, 1991 general election and plaintiffs' attorney agreed to do so, and campaigned diligently from February 28, 1991 to April 2, 1991. Plaintiffs' attorney's affidavit further stated that plaintiffs' attorney's failure to have filed plaintiffs' response to the defendants' dismissal motion was not deliberate, or willful, and was not due to any lack of respect by plaintiffs' attorney to the court or the court's rules, but said failure was occasioned

solely and only by plaintiffs' attorney's said illnesses, recuperations, campaign labors and efforts. The affidavit additionally stated that plaintiffs had a good and meritorious cause of action against the defendants, and that plaintiffs should not be penalized or punished by dismissal of their complaint because of plaintiffs' attorney's overburdened schedule which prohibited him filing plaintiffs' response to the defendants' motion to dismiss within the prescribed time; nor should the defendants be awarded, by dismissal of plaintiffs' complaint, a windfall, and thus avoid the legal consequences of their illegal criminal conspiracy to keep plaintiffs, the HWP and its candidate off the November 6, 1990 ballot. Plaintiffs' attorney at the April 22, 1991 proceeding to vacate the dismissal order submitted to the court plaintiffs' response to the defendants' motion to dismiss plaintiffs' complaint, and it was clear therefrom that the defendants' dismissal motion was not well founded in law or fact, but was frivolous and totally without merit.

Plaintiffs' attorney further asserted that Federal Rule 41(b) provided that upon the failure of a plaintiff to comply with an order of court, a defendant may move for dismissal of any action or claim against the defendant; that there was no court order that plaintiffs-petitioners file a response, and thus such a dismissal order as requested would be improper; and that the defendants' dismissal motion under Federal Rule 41(b) made no claim that defendants were or could possibly be prejudiced by plaintiffs' attorney's failure to have filed plaintiffs' response to the defendants' dismissal motion.

The district court granted the defendants until Friday, April 26, to respond to plaintiffs' motion to vacate the April 5th dismissal order and granted plaintiffs to Friday, May 3, to reply, and the court took plaintiffs' motion to vacate the dismissal order under advisement.

Defendants filed their objections to plaintiffs' motion to vacate on April 26, 1991, the basis of which was that the motion to vacate was untimely under Rule 59E of the Federal Rules of Civil Procedure. Plaintiffs' reply, filed May 3rd, responded that said rule was inapplicable and that defendants were not harmed by plaintiffs' delay in responding to defendants' frivolous and meritless motion to dismiss plaintiffs' complaint.

Three and one-half months later, ironically, a delay occasioned in part by the district judge's unfortunate and untimely illness – just as the delay was caused in part by plaintiffs' attorney's illness, the district judge, on July 15th, filed a written opinion denying plaintiffs' motion to vacate the April 5th, dismissal order. The court of appeals affirmed. Significantly, both the district court and the court of appeals omitted from their opinions the hereinbefore mentioned irrefutable and admitted dastardly deeds committed by the CCCDP to keep the plaintiffs-petitioners', the HWP and its candidates off the ballot, set forth in plaintiff-petitioners' complaint, thereby allowing these despicable acts and criminal conduct by the CCCDP to remain buried in the court records and hidden from critical public view and scrutiny.

(i)

THE BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT, THE COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the United States District Court, the court of first instance, was Title 42, U.S.C. Section 1983, pursuant to which plaintiffs-petitioners' complaint was brought.

(j)

ARGUMENT FOR ALLOWANCE OF THE WRIT

I

BECAUSE THE DISTRICT COURT DID NOT GIVE THE CLASSES NOTICE OF (1) THE PENDENCY, (2) THE CONDUCT, OR (3) THE PROPOSED DISMISSAL OF PLAINTIFFS-PETITIONERS' CLASS ACTION COMPLAINT, AS REQUIRED BY RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, THE DISTRICT COURT ERRED IN DISMISSING THE CLASS ACTION COMPLAINT.

Because the district court did not give notice to the classes of (1) the pendency, (2) the conduct, and (3) the proposed dismissal of plaintiffs-petitioners' class action complaint, as required by Rule 23 of the Federal Rule of Civil Procedure, the district court erred in dismissing the class action complaint.

We emphasize that plaintiffs-petitioners' complaint alleged flagrant, pompously arrogant and devastatingly oppressive violations by defendants-respondents of the most sacred and cherished freedoms and constitutional rights of a citizen in a democratic society – the right of political association, to politically organize, to ballot access, to elect and elective political office and to vote for a candidate of one's choice for public office. Plaintiffs-petitioners quite properly, and indeed quite laboriously resorted to and engaged in the lawful process to rectify, correct and readdress their political deprivations. Plaintiffs-petitioners sought, in conformity with the law and their constitutionally endowed rights and freedoms, to redress their political denials. The defendants-respondents admittedly, reprehensibly, illegally and criminally conspired to stifle, destroy and defeat the legitimate efforts of this struggling neophyte political party, to avoid and prevent its competition. These facts and allegations of plaintiffs-petitioners' complaint were overwhelming and were irrefutable.

We emphasize that an attorney appeared in the district court on behalf of plaintiffs-petitioners on each and every occasion that the case was scheduled before the court.

We emphasize that the aforesaid extended illnesses, hospitalizations, and political endeavors and labors of plaintiffs-petitioners' attorney were uncontroverted.

We emphasize that an attorney appeared on behalf of plaintiffs-petitioners and requested a mere additional 14 days within which to respond to defendants-respondents' dismissal motion. That reasonable request was denied and the district court dismissed plaintiffs-petitioners' complaint.

We emphasize that plaintiffs-petitioners' complaint was valid and alleged a cause of action against defendants-respondents, and that the latter's motion to dismiss the complaint was without merit and patently frivolous.

We emphasize that on presentation of their motion to vacate the dismissal order, plaintiffs-petitioners' attorney presented their response to defendants-respondents' dismissal motion.

We emphasize that the district judge properly should have ruled on defendants-respondents' motion to dismiss plaintiffs-petitioners' complaint on the merits of the aforementioned grounds urged and relied on by defendants-respondents, rather than dismiss the complaint because of plaintiffs-petitioners' failure to have filed a response to the defendants-respondents' motion to dismiss the complaint.

We emphasize that the instant case is the third case in which plaintiffs-petitioners have been wronged and denied justice in the courts below, and that the instant case is the third case in which plaintiffs-petitioners have been compelled to seek redress of these injustices in this Court. Norman [HWP] v. Reed, 502 U.S. ___, 116 L. Ed. 2d

and 711, 112 S.Ct. 698 (1992); Norman [HWP] v. Reed, filed 4/30/93, #92-1739 and is now pending in this Court.

We emphasize that the instant complaint was a class action. The complaint alleged that, (1) Plaintiff Barbara Norman was representative of the class of the HWP candidates in the November 6, 1990 Cook County, Illinois general election, (2) Plaintiff Timuel Black was representative of the class of persons who signed the HWP nominating petitions for said election, (3) Plaintiff O.B. Roberts was representative of the class who circulated the HWP nominating petitions for voters' signatures for said election, and (4) Plaintiff Fannie O'Bannion was representative of the class of HWP supporters and voters in said election.

In accordance with the provisions of Rule 23 (b) (3) of the Federal Rules of Civil Procedure, Paragraph 7a of the complaint further alleged, inter alia, that "the question of law and/or fact common to the class, and each member thereof predominate over any question affecting only individual members, and that a class action is superior to the available methods for the fair and efficient adjudication of the controversy".

It is provided in Rule 23 (c) (2) of the Federal Rules of Civil Procedure that in a class action under Federal Rule 23 (b) (3), "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that . . . any member who does not request exclusion may, if the member desires, enter an appearance through counsel".

Rule 23 (d) (2) of the Federal Rules of Civil Procedure provides that in a class action, the court may make appropriate orders "requiring, for the protection of the members of the class . . . that notice be given to some or all of

the members of any step in the action . . . that notice be given to some or all of present claims or defenses, or otherwise to come into the action".

Finally, Rule 23(e) of the Federal Rules of Civil Procedure provides that "a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class . . . ".

None of the foregoing notice requirements of Rule 23 was given. By reason thereof, particularly because of the failure to give "notice of the proposed dismissal," under Rule 23(e), the district court's April 5th dismissal order should not have been entered and its entry was clearly erroneous. The district court's refusal to vacate the dismissal order was therefore likewise erroneous.

The question inevitably arises whether the district judge, on the same facts as in the case at bar, would have dismissed the complaint of AT&T, Chrysler Motors Company, Douglas Aircraft Company, or some similar notable plaintiff, involving a multi-million dollar products liabilities, patent infringement or some similar issue.

The court of appeals avoided deciding the validity or invalidity of the district court's dismissal of the class action complaint without the requisite Rule 23 notices. The court of appeals evasively and erroneously concluded that "This argument [of requirement of notices to the class] raises the question of whether there is a final judgment over which this court has jurisdiction". The court of appeals quite correctly noted that "the district court never addressed the class certification issue" and did not reserve the question. Neither did the court of appeals. The court of appeals circumventingly concluded, "We have jurisdiction to consider the appeal", an issue which neither party raised. The court of appeals declined to decide the validity of the district court's no-notice dismissal order, an issue that *was* raised. By this aberration, the court of appeals so far departed from the

accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

II

BECAUSE THE DISTRICT COURT NEVER ORDERED PLAINTIFFS' ATTORNEY TO FILE A RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT, THE DISTRICT COURT LACKED AUTHORITY TO DISMISS, AND ERRED IN DISMISSING PLAINTIFFS' COMPLAINT, UNDER RULE 41 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, FOR PLAINTIFFS' FAILURE TO FILE SUCH RESPONSE

The district court never ordered plaintiffs-petitioners' attorney to file a response to defendants-respondents' motion to dismiss plaintiffs' complaint. The district court therefore lacked authority to dismiss, and erred in dismissing plaintiffs' complaint, under Rule 41(b) of the Federal Rules of Civil Procedure, because of plaintiffs' failure to file such response.

Rule 41(b) of the Federal Rules of Civil Procedure governs. It provides in pertinent part:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant".

The defendants moved and the district court dismissed plaintiffs' complaint because plaintiffs' attorney failed to file a response to the defendants' motion to dismiss. A complete, thorough, and diligent search of the entire record of proceedings before the district court however reveals that there was no court order for plaintiffs' attorney to file a response to the defendants' dismissal motion. The district court therefore erred in dismissing plaintiffs' complaint because of plaintiffs' attorney's failure to file a response.

A practically identical situation was presented to and resolved by the court of appeals for the seventh circuit in *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224 (1983). In *Stevens*, the defendant served the plaintiff with a notice to take his deposition, along with a subpoena duces tecum for plaintiff to bring with him copies of all documents he intended to submit as exhibits at trial. Plaintiff-Stevens appeared at the deposition empty-handed, without the subpoenaed documents, and refused to give his deposition, for which reasons the district court dismissed his complaint. On appeal, the court held:

> "In the dismissal, the [trial] court cited Rule 37 (b)(2)(C), which provides that suit may be dismissed if 'a party . . . fails to obey an order to provide or permit discovery . . . ' 'Fed.R.Civ.P. **Rule 37(b) provides comprehensively for sanctions for failure to obey discovery orders. It has no application if there has not been a court order'. Since the trial court did not issue a discovery order directing the plaintiff to submit to deposition prior to dismissing the suit, the trial court's reliance on Rule 37(b)(2)(C) in dismissing the plaintiff's suit was misplaced".** 710 F.2d 1224, 1228 (1983).

The court's foregoing holding in *Stevens* is controling in the case at bar. **Since the district court in the case at bar did not issue an order directing plaintiffs' attorney to file a response to the defendants' dismissal motion prior to dismissing plaintiffs' complaint, the district court's reliance on Rule 41(b) in dismissing plaintiffs' complaint was likewise misplaced and erroneous.**

Here again, the court of appeals in the case at bar avoided and refused to decide, or even address this issue. The court of appeals did not rule on or discuss the

validity of the dismissal order under Federal Rule of Civil Procedure 41(b), which, we again state, authorizes dismissal only for plaintiff's failure (1) to prosecute, (2) to comply with the [Federal] rules [of Civil Procedure], or (3) **to comply with any order of Court.** Again, by such an aberration the court of appeals so far departed from the accepted and usual course of judicial proceedings and flagrantly sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

III

IT WAS ERROR AND AN ABUSE OF THE DISTRICT COURT'S DISCRETION TO REFUSE TO VACATE ITS DISMISSAL ORDER

To affirm the district court's dismissal order the court of appeals ignored and refused to decide the validity of the dismissal order and under Rules 23 and 41(b) of the Federal Rules of Civil Procedure. To affirm the district court's dismissal order, the court of appeals ruled and resorted to, decided and relied on the most tenuous grounds urged by plaintiffs-petitioners for reversal – abuse of the district court's discretion. Although this may indeed be a novel and ingenious method of appellate review and determination, this appellate review method certainly is unprecedented and invalid. In the case at bar, the court of appeals, as did the district court, ignored and abandoned its own precedents in *C.K.S. Engineers v. White Mountain Gypsum*, 726 F.2d 1202 (7th Cir. 1984); *Passarella v. Hilton International*, 810 F.2d 674 (7th Cir. 1987); *Dormeyer Co. v. M.J. Sales*, 461 F.2d 40 (7th Cir. 1972); *Ellingsworth v. Chrysler*, 665 F.2d 180 (7th Cir. 1981); and *Stevens v. Greyhound Line, Inc.*, 710 F.2d 1224 (7th Cir. 1983). The court of appeals so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Under the hereinbefore set forth facts in the case at bar, it cannot be persuasively argued or accurately concluded that the district court did not abuse its discretion in refusing to vacate its dismissal order. The court of appeals expressly recognized and admitted "that the facts in this case are not as egregious as some". The court of appeals apparently was referring to the more egregious facts in *C.K.S. Engineers, Dormeyer Co., Ellingsworth, Passarella* and *Stevens*, above, cited, in which relief was granted. Yet, the court of appeals refused to follow these precedents in the case at bar and denied plaintiffs-petitioners, the HWP, relief. And so, this is just another of the many unjust hurdles confronting the fledging floundering HWP and over which it must overcome.

The court of appeals observed in the case at bar that:

> "When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be tempted to engage in such conduct."

First, the instant case did not involve a "failure to prosecute".

Second, it is clear from the foregoing facts in the instant case that plaintiffs-petitioners' attorney was not engaged in dilatory conduct, nor was he tempted so to do.

Third, but even if the attorney was dilatory, sanctions should have been imposed against him therefor, not against plaintiffs-petitioners for his misconduct.

Fourth, regarding "dilatory conduct" and "controlling [the Court's] own crowded docket," we parenthetically note that the district judge had plaintiffs-petitioners' motion to vacate the dismissal order under consideration from April 5th to July 12th, over three months, because of his schedule and illness, practically

identical to the period in which plaintiffs-petitioners' attorney was unable to respond to the dismissal motion, and likewise because of his schedule and illnesses. Moreover, the court of appeals had the instant appeal under consideration for over a year after oral argument on January 17, 1992 and its decision on January 29, 1993. Surely, this unexplained delay is not attributable to dilatory conduct. Likewise, plaintiffs-petitioners' aforesaid explained delays should not be so construed.

For these above and foregoing reasons, it is respectfully prayed and submitted that the Petition for a Writ of Certiorari be granted and that the decision of the United States of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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APPENDIX

(i)

THE OPINION OF THE COURT SOUGHT TO BE REVIEWED

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2712
THE HAROLD WASHINGTON PARTY, et al.,

Plaintiffs-Appellants,

v.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90-C-5731 – **Charles P. Kocoras**, *Judge.*

ARGUED JANUARY 17, 1992 – DECIDED JANUARY 29, 1993

Before FLAUM and MANION, *Circuit Judges*, and CURRAN, *District Judge.**

CURRAN, *District Judge.*

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* The Honorable Thomas J. Curran, District Judge for the Eastern District of Wisconsin, is sitting by designation.

A. BACKGROUND

The Harold Washington Party (HWP), named after a deceased Chicago mayor, is a fledgling Chicago political party whose voters, members and supporters are predominantly African-Americans. The party was founded and incorporated in Illinois as a Chicago political party in 1989. As the November 6, 1990, general election approached, the party attempted to become a political presence in Cook County, Illinois, as well as in the City of Chicago, by slating candidates for the positions of Cook County Sheriff, State's Attorney, Assessor, Clerk, Treasurer, Board President, as well as other offices.[1] Nominating petitions containing over 60,000 signatures were filed on behalf of these candidates.

The case before us arose out of the efforts of the Chicago Cook County Democratic Party (CCCDP) to remove the Harold Washington Party candidates from the Cook County November 6, 1990, general election ballot. The background of this dispute, as recounted by the

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[1] Under Illinois law, citizens wishing to organize a "new political party" must collect approximately 25,000 signatures from voters in the political unit in which the party intends to slate candidates for office. If enough valid signatures are collected, the organization becomes a "new political party" under Illinois law. *See* Ill. Rev. Stat., ch. 46, § 10-2 (1989). If the party gathers five percent of the vote in the next election, it becomes an "established political party." *Id.* However, a "new" political party can become "established" only in the political subdivision where it has fielded candidates. Thus, prior to the November 6, 1990, general election, the Harold Washington Party was not an established party in Cook County, Illinois, even though it had become established in the City of Chicago municipal elections.

Illinois Supreme Court in a related action, evolved as follows:

> On August 6, 1990, Barbara J. Norman and others (the Party) filed petitions to place their names on the November 6, 1990, election ballot as candidates for office under the HAROLD WASHINGTON PARTY (Washington Party) name. The Washington Party candidates filed as a "new" political party in Cook County under article 10 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-1 et seq.), even though the Washington Party was already an established party in the City of Chicago. The Washington Party fielded candidates for all nonjudicial, countywide offices, and for county commissioners to be elected at-large within the City of Chicago (city commissioners), county commissioners to be elected at-large from outside the City of Chicago (suburban commissioners) and commissioners of the Water Reclamation District of Greater Chicago.
>
> Dorothy Reed and others (the objectors) filed objections to the Washington Party candidates' nomination pursuant to section 10-8 of the code, contending that the Washington Party petitions lacked the requisite number of signatures, and had failed to meet other requirements of section 10-2 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-2).
>
> The Cook County officers electoral board (the board) examined the objections and held that the Washington Party candidates were entitled to appear on the November ballot, with the exception of the candidates for the water district and the suburban-district commissioners. The board found that the Washington Party had

failed to gather the necessary number of petition signatures from within those districts in support of those candidates.

The objectors appealed the board's decision to the circuit court of Cook County. That court, in an order filed on September 20, 1990, affirmed the board's decision in part and reversed it in part. It held that the failure of the suburban commissioners' candidacy and the failure to present judicial candidates resulted in a failure by the Washington Party to submit a "complete slate" of candidates as required by section 10-2 of the Code, and that therefore all Washington Party candidates were ineligible for the ballot.

This court then reviewed the circuit court's decision pursuant to Illinois Supreme Court Rule 302(b) (134 Ill.2d R. 302(b)), and issued an order filed on October 12, 1990, affirming the circuit court's decision on two separate grounds. First, this court held that the Washington Party candidates could not use the Washington Party party name because it was the name of an "established political party," in violation of section 10-5 of the Code. Second, this court held that the failure of the suburban commissioners' petitions resulted in the Washington Party's failure to file a complete slate of candidates and that, therefore, its nomination papers did not comply with section 10-2. As a result, this court found it unnecessary to address the remaining points raised on appeal, among them being whether the Washington Party's failure to slate judicial candidates was fatal to its candidates' petitions.

Reed v. Kusper, No. 70833, 1992 WL 356050 at *1 (Ill. December 4, 1992) (ruling after remand).

Shortly thereafter, the United States Supreme Court granted certiorari, stayed the order of the Illinois Supreme Court, and ordered that the Harold Washington Party candidates be listed on the November 6, 1992 ballot. On January 14, 1992, the Supreme Court issued an opinion upholding the decision of the Cook County Officers Electoral Board. *See Norman v. Reed*, 112 S. Ct. 698 (1992).

Meanwhile, on October 1, 1990, the appellants[2] filed the instant action in the United States District Court for the Northern District of Illinois alleging that the Cook

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[2] The purported Plaintiffs-Appellants are: The Harold Washington Party; Barbara Norman, a HWP candidate and representative of a class of HWP candidates in the November 6, 1990 election; Timuel Black, a HWP nomination petition signer and representative of a class of signers of HWP nominating petitions for the November 6, 1990 election; Fannie O'Bannion, a HWP supporter and voter; and O.B. Roberts, a HWP petition circulator and representative of a class of circulators of the HWP nominating petitions for the November 6, 1990 election.

This circuit holds that Federal Rule of Appellate Procedure 3(c) requires, as a matter of jurisdiction, that the caption and notice of appeal, read together, must contain the names of all appellants. *See Albedyll v. Wisconsin Porcelian Company Revised Retirement Plan*, 947 F.2d 246, 253 (7th Cir. 1991). The Plaintiffs' "Notice of Appeal" specifically names only the Harold Washington Party as the appellant. Consequently, the other named Plaintiffs in the district court have forfeited their appeal rights. *See Allen-Archery, Inc. v. Precision Shooting Equipment*, 857 F.2d 1176, 1177 (7th Cir. 1988). Although we will continue to refer to the Plaintiffs-Appellants in the plural, the Harold Washington Party is the only valid Appellant.

County Democratic Party and eleven individuals[3] conspired to keep the Harold Washington Party candidates off the November 6 ballot. The Plaintiffs in the district court sought injunctive and monetary relief pursuant to 42 U.S.C. § 1983 for violations of their constitutional rights guaranteed by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. The Complaint also cites 18 U.S.C. § 231 and 42 U.S.C. §§ 1971 & 1985(2) as avenues of relief. Four attorneys filed notices of appearances on behalf of the Plaintiffs. Lead attorney for the Plaintiffs was R. Eugene Pincham, who ran as the Harold Washington Party candidate for mayor during the pendency of this action.

On November 13, 1990, the Defendants filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. *See* Federal Rule of Civil Procedure 12(b)(1) & (b)(6). At a December 3, 1990, status conference a briefing schedule was set whereby the Plaintiffs were to respond to the motion by January 2, 1991. The briefing schedule was memorialized by a minute order. On January 11, 1991, Attorney Robert E. Pincham, Jr. filed a motion seeking an extension of time in which to respond on the ground that his father, the lead counsel, was recovering from surgery. The court granted the motion and ordered the Plaintiffs to respond by February 1. This schedule was also memorialized as a

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[3] The named Defendants are: the Cook County, Illinois Democratic Party; its chairman Thomas Lyons; its attorneys, Michael Carey and Ray Simmon; its candidate for Cook County Sheriff, Michael Sheahan; its supporter, Bonnie McGuire; and Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricks, David Barrera, and Dorothy Reed, objectors to the HWP petitions.

minute order. On January 23, 1991, the Plaintiffs again moved for an extension of time due to the continuing illness of the lead attorney. Again, the motion was granted and the district judge ordered the Plaintiffs to respond by March 1. After that deadline passed with no response being filed, the Defendants moved for entry of an order granting their motion to dismiss for lack of jurisdiction, for failure to state a claim, and for failure to respond to the original motion to dismiss.

The court heard the Defendants' motion on April 5, 1991, at which time the Plaintiffs asked for another fourteen days in which to respond. This time the court denied the request and granted the motion to dismiss. A final judgment dismissing the action with prejudice was docketed on April 8, 1991.

On April 17, 1991, the Plaintiffs served a motion to vacate the April 5 order dismissing the complaint. This motion was heard on April 22, at which time the Plaintiffs finally responded to the motion to dismiss. In a July 12, 1991, memorandum opinion, the district court decided that this motion was untimely for purposes of Federal Rule of Civil Procedure 59(e),[4] so it considered the

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[4] The parties have failed to note that, while the motion to dismiss was granted on April 5, judgment was not entered on the docket until April 8. *See* Federal Rules of Civil Procedure 58 & 79(a) (a judgment is effective only when set forth as a separate document and entered on the docket). Therefore, excluding weekends, the motion to vacate was filed within the ten day time limit specified in Rule 59(e). Nevertheless, the Plaintiffs vehemently denied that their motion was brought pursuant to Rule 59(e). *See* Plaintiffs' Answer to the Defendants' Objections to Plaintiffs' Motion to Vacate the Order of April 5, 1991 Dis-

motion under Rule 60(b) and found that the Plaintiffs had not established mistake, surprise, inadvertence, excusable neglect or any other exceptional circumstances. Therefore, the motion to vacate was denied.

On July 19, 1991, the Plaintiffs filed a notice of appeal from the court's order of July 12. The principal issue before us is whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment of dismissal under Rule 60(b). Because we conclude that he did not, we affirm.

B. CLASS ALLEGATIONS

As a threshold matter, the Plaintiffs point out that, because this case was filed as a Class action, the district court erred when it dismissed the complaint with prejudice without addressing the issue of class certification or notifying the putative class. *See* Federal Rule of Civil Procedure 23(c)(1). This argument raises the question of whether there is a final judgment over which this court has jurisdiction. *See* 28 U.S.C. § 1291. If the district court has indicated that it contemplates additional proceedings to address the class issue, its judgment is not final for purposes of appeal.

In this case the district court never addressed the class certification issue and did not specifically reserve that question. Our cases hold that, absent a reservation of the class certification issue, the district court's failure to

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missing Plaintiffs' Complaint at 1-2. Therefore, we cannot say that the district court erred in applying Rule 60(b).

certify the class does not render the district court's judgment nonfinal, but merely limits the scope of the judgment in that the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants. *See, e.g., Rutan v. Republican Party,* 868 F.2d 943 (1989) (en banc), *aff'd in part and rev'd in part on other grounds,* 497 U.S. 62 (1990); *Currie v. Diamond Mortgage Corporation,* 859 F.2d 1538 (7th Cir. 1988); *Gomez v. Illinois State Board of Education,* 811 F.2d 1030 (7th Cir. 1987). Accordingly, we have jurisdiction to consider this appeal.

C. RULE 60(b)

We now turn to the issue of whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment under Rule 60(b). Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

> equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

It is well-established the Rule 60(b) relief "is an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Engineers, Inc. v. White Mountain Gypsum Company*, 726 F.2d 1202, 1205 (7th Cir. 1984). Because district courts must be able to control their own dockets, we give them wide latitude in declining Rule 60(b) motions and review such decisions only for an abuse of discretion. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 228-29 (7th Cir. 1991). An abuse of discretion can be found only where " 'no reasonable person could agree with the district court.' " *Nelson v. City Colleges of Chicago*, 962 F.2d 754, 755 (7th Cir. 1992) (quoting *McKnight v. United States Steel Corporation*, 726 F.2d 333, 335 (7th Cir. 1984)).

At the hearing held on April 5, 1991, the district court did not address the merits of the Defendants' motion to dismiss. Instead, the judge recounted the procedural history of the case, including the two extensions of time granted to the Plaintiffs and their failure to file a response to the motion despite the appearance of four lawyers on their behalf. After chastising the Plaintiffs for this delay and inaction, the judge granted the motion to dismiss. Although the Defendants moved for dismissal on the merits, it is apparent from the judge's remarks that the motion to dismiss was granted pursuant to Federal Rule of Civil Procedure 41(b), which provides that:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The Plaintiffs then filed their motion to vacate the judgment which was subsequently entered on April 8. The Plaintiffs argued that they had a meritorious response to the motion to dismiss; that the Defendants had shown no prejudice; and that their failure to file a timely response to the motion was not willful but was occasioned by the lead counsel's illness and his campaign for the office of mayor of Chicago.

In its July 12 memorandum opinion the court ruled that the Plaintiffs had failed to establish grounds of "mistake, surprise or excusable neglect." As he denied the motion to vacate, the judge observed that, while the lead counsel might have been unable to respond, the other three attorneys who appeared for the Plaintiffs had wholly failed to explain their failure to answer the motion to dismiss.

Following the conclusion of these proceedings in the district court, the only timely notice of appeal filed by the Plaintiffs was from the July 12 order denying their motion to vacate under Rule 60(b). An appeal from the denial of a Rule 60(b) motion does not trigger appellate review of

the merits of the underlying judgment.[5] *See Kagan v. Caterpillar Tractor Company,* 795 F.2d 601, 607 (7th Cir. 1986). Thus, all that is before this court is the district court's refusal to vacate its judgment.

Our review of the record does not reveal that the district court relied on forbidden factors or failed to consider any important relevant factor in denying the Plaintiffs' motion to vacate. *See Tolliver v. Northrop Corporation,* 786 F.2d 316, 319 (7th Cir. 1986). The only ground listed in Rule 60(b) addressed by the Plaintiffs was "excusable neglect." *See* Federal Rule of Civil Procedure 60(b)(1). And, as the district judge pointed out, what may arguably have been excusable neglect on the part of the lead counsel could not excuse or explain the neglect on the part of the other three counsel of record.

The Plaintiffs vehemently maintain that they had a meritorious response to the motion to dismiss, but the existence of a meritorious defense, standing alone, does not excuse carelessness and disregard for court orders and schedules. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.,* 925 F.2d 226, 230 (7th Cir. 1991). Similarly, the lack of prejudice to the Defendants is not a factor which lends any weight to the Plaintiffs' position. When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be

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[5] Consequently, the Plaintiffs' argument that the court never *ordered* them to file a brief prior to dismissal is both incorrect and irrelevant as they can no longer appeal from the judgment of dismissal under Rule 41(b) for want of prosecution.

tempted to engage in such conduct. *See National Hockey League v. Metropolitan Hockey League Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

In this instance the Plaintiffs had four months to argue the merits of their claims. Offering their response only after judgment had been granted did not demonstrate the diligence or extraordinary circumstances necessary to invoke Rule 60(b). When a party abdicates its responsibilities through its attorneys' carelessness, relief from judgment under Rule 60(b) is not warranted. *See Zuelzke*, 925 F.2d at 229; *Western Transportation Company v. E.I. DuPont de Nemours and Company*, 682 F.2d 1233, 1236 (7th Cir. 1982). While the facts in this case are not as egregious as some, this court cannot conclude that the district judge abused his discretion or was unreasonable in finding that the Plaintiffs had not established excusable neglect. Therefore, the district court's judgment denying relief under Rule 60(b) Is AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

(ii)

THE MEMORANDUM OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

THE HAROLD WASHINGTON PARTY, et al.,	)	
Plaintiffs,	)	No. 90C5731
vs.	)	HONORABLE CHARLES P. KOCORAS
THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,	)	
Defendants.	)	

Memorandum Opinion filed June 15, 1991

This matter is before the court on the plaintiffs' motion to vacate this court's dismissal of the case. For the reasons discussed below, the motion is denied.

BACKGROUND

The plaintiffs filed this action on October 9, 1990 alleging that the defendants had engaged in a conspiracy to keep Harold Washington Party candidates off the November 6, 1990 Cook County ballot. The defendants filed a Rule 12(b)(6) motion to dismiss the complaint on November 13, 1990 and a brief in support of that motion on November 30, 1990. The plaintiffs were given until January 2, 1991 to file a response to the motion. The

deadlines passed without a word from the plaintiffs. On January 11, 1991 the plaintiffs asked to have until January 18, 1991 to file their response. The extension was granted, and the plaintiffs again missed the deadline. Ten days later the plaintiffs returned to court and requested a month and a half to file their brief. This new March 1, 1991 was missed in complete silence.

On April 5, 1991, a full month after the latest deadline, the defendants moved to dismiss the action. Noting the right of litigants to diligence on the part of their opponents in resolving disputes, this court granted the defendants' motion and entered final judgment against the plaintiffs.

Seventeen days later the plaintiffs, through one of their attorneys, R. Eugene Pincham, Sr., filed the instant motion to vacate the April 5, 1991 judgment. Mr. Pincham underwent surgery at the end of November 1990. Then, during his recuperation, he was asked to help Danny Davis in the latter's bid for the 1991 Democratic mayoral nomination. When that bid failed, the Harold Washington Party asked Mr. Pincham to run for mayor under its banner. Mr. Pincham states that these events so occupied his time that he was unable to file a timely response to the defendants' Rule 12(b)(6) motion.

DISCUSSION

A. Legal Standard

The Seventh Circuit and courts of this district adhere to a policy favoring resolution of disputes on the merits. *Chandler Leasing Corp. v. UCC, Inc.*, 91 F.R.D. 81, 83 (N.D.

Ill. 1981). The preference for meritorious resolution of disputes must, however, be balanced against the court's duty to protect and promote efficient litigation that will accrue to the benefit of all litigants. *See North Central Illinois Laborers' District Council v. S.J. Groves & Sons Company*, 842 F.2d 164, 167 (7th Cir. 1980); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984). To effectively perform this duty, courts have the inherent power to dismiss a case "in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not." *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983).

Relief from a final order of dismissal may be obtained only upon a showing of exceptional circumstances as defined by Rule 60(b). *Railroad Maintenance Laborers v. American Railroad Construction Co.*, 96 F.R.D. 433, 435 (7th Cir. 1985). Such circumstances consist of

> (1) mistake, inadvertance [sic], surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misrepresentation or other conduct of the adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

B. Analysis

Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the plaintiffs' three months to respond to the defendants'

motion to dismiss. Finally, after a month of silence following the plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of "mistake, surprise or excusable neglect." The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to a motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least given timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied.

(S) Charles P. Kocoras

APPENDIX

(iii)

THE ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 17, 1993

HON. JOEL M. FLAUM, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. THOMAS J. CURRAN, District Judge*

HAROLD WASHINGTON PARTY, Plaintiff-Appellant, No. 91-2712 v. COOK COUNTY ILLINOIS DEMOCRATIC PARTY, THOMAS LYONS, individually and in his official capacity as Chairman of the COOK COUNTY ILLINOIS DEMOCRATIC PARTY, TOM CAREY, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 5731 Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause on February 26, 1993, by plaintiff-appellant, no judge in active service has requested a

* The Honorable Thomas J. Curran, District Judge for the Eastern District of Wisconsin, is sitting by designation.

vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX

(iv)

THE COMPLAINT OF THE HAROLD WASHINGTON PARTY (HWP), ET AL., PLAINTIFFS VS. THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTRY [sic], ET AL, DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

The Harold Washington Party; Barbara Norman, Representative of the Class of Harold Washington Party (HWP) Candidates in the November 6, 1990 Election; Timuel Black, Representative of the Class of Signers of the HWP Nominating Petitions for the November 6, 1990 Election; and Fannie O'Bannon, a Supporter and Voter of the HWP and its Candidates in the November 6, 1990 Election; O.B. Roberts, Representative of the Class of Circulators of the HWP Nominating Petitions for the November 6, 1990 Election.	JUDGE KOCORAS 90C5731 MAGISTRATE BUCKLO DOCKETED OCT 09 1990 FILED-ED5 90 OCT-1 PM 2:47 CLERK U.S. DISTRICT COURT
Plaintiffs,	
-vs-	
The Cook County, Illinois Democratic Party, Thomas Lyons, Individually and in His Official Capacity as Chairman of the Cook County Illinois Democratic Party, Tom Carey, Michael Carey, Michael Sheahan, Ray Simmon, Bonnie McGuire, Valerie A. Sutton, Patton L. Feichter, Ervin S.Picke [sic], David Barrera, Dorothy Reed and unnamed co-conspirators,	
Defendants.	

Complaint for Injunctive Relief, Actual and Punitive Money Damages and Other Relief

Nature of the Action

1. This is an action brought pursuant to 42 U. S. C. Sec. 1983 for actual and punitive money damages for the illegal conspiratorial acts and the conspiracy by the defendants to illegally keep the Harold Washington Party (HWP) and its candidates off the Cook County, Illinois November 6, 1990 general election ballot, in violation of rights and privileges provided in and guaranteed by the 1st, 14th and 15th Amendments to the Constitution of the United States, Title 18 U.S.C. Sec 231, Title 42, U.S.C., Secs. 1971, 1985 (2) and all other applicable statutes and laws.

2. The defendants illegally acted and illegally conspired to deny the HWP and its candidates ballot status in the November 6, 1990, Cook County, Illinois general election, by filing and causing to be filed false affidavits and objections and fraudulent documents in support thereof with the Cook County Illinois Clerk against, and to have, the HWP and its candidates removed from the Cook County, Illinois, November 6, 1990 general election ballot, and by the commission of various and other sundry acts and conduct, causing serious and grievous injury and damages to plaintiffs.

Jurisdiction, Jury Demand and The Parties

3. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1343 (3); and plaintiffs demand trial by jury.

4. The Plaintiff, The Harold Washington Party, is an established political party in Chicago, Illinois, incorporated under the laws of the State of Illinois; Plaintiff, Barbara Norman, is a candidate of the HWP for President of and membership of the Cook County Illinois Board of Commissioners in the November 6, 1990, Cook County, Illinois general election, and she is representative of the class of HWP candidates in said election.

5. Plaintiff, Timuel Black, A Chicago, Cook County registered voter signed the HWP nominating petitions to have the HWP candidates placed on the Cook County Illinois, November 6, 1990 general election ballot for election to the Cook County offices to which the candidates were therein designated; he is representative of the class of the signers of the said HWP nominating petitions.

6. Plaintiff, O.B. Roberts, a Chicago-Cook County registered vote [sic] circulated the HWP nominating petitions for signatures to have the HWP candidates for Cook County public office placed on the Cook County November 6, 1990 general election ballot for election to the offices to which the candidates were therein designated; and he is representative of the class of circulators of the said HWP nominating petitions.

7. Plaintiff, Fannie O'Bannon is a supporter and voter of the HWP and its candidates in the Chicago, April, 1989 Chicago Mayoral Election and in the November 6, 1990, Cook County general election, and Fannie O'Bannon is representative of the class of such HWP supporters and voters in said election.

7A

Plaintiffs' cause of action arises out of the same transaction and occurrence or series of transactions or occurrences.

Members of the aforementioned classes are so numerous that joinder of all members is impractical; there are questions of law and fact common to each of the hereinfore named classes; the claims of the representative parties are typical of the claims of each class; the representative parties will fairly and adequately protect the interest of the class.

In addition, the prosecution of separate actions by individual members of the class would create a risk of, (a) inconsistent and varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party class, and (b) adjudications with respect to individual members of the class which would as a practical matter be despositive [sic] of the interest of the other members not parties to the adjudication, and substantially impair and impede their ability to protect their interests

Moreover, the defendants have acted on grounds applicable to each named class and each member thereof, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The questions of law and/or fact common to the class, and each member thereof predominate over any questions affecting only individual members, and that a

class action is superior to the available methods for the fair and efficient adjudication of the controversy.

8. The defendant, Cook County Democratic Party, is an established rival political party in Chicago, Cook County, Illinois, incorporated under the laws of the State of Illinois; The defendant, Thomas Lyons, is chairman of the Cook County Democratic Party and Chicago 45th Ward Democratic Party Committeeman.

9. The defendant, Tom Carey, is an aid to defendant, Cook County Democratic Party Chairman, Thomas Lyons, and he is also a member of the Cook County Democratic Party.

10. The defendant, Michael Carey, is an attorney licensed to practice, and engaged in the practice of law, with offices in Chicago, Illinois, and a member and supporter of and legal advisor and counselor to the Cook County Democratic Party and its members.

11. The defendant, Michael Sheahan, is Chicago 19th Ward Alderman, a member and supporter of the Cook County Democratic Party and the Cook County Democratic Party nominee for Cook County Sheriff in the November 6, 1990 general election.

12. The defendant, Ray Simon, is former Chicago Corporation Counsel, Chairman of the Democratic Party's gubernatorial candidate, Neil Hartigan's, campaign for the November 6, 1990 general election, and attorney and a member and supporter of the Cook County Democratic Party.

13. Defendant, Bonnie McGuire, is the 12 year secretary of 18th Ward Alderman Robert Kellum and a member and supporter of the Cook County Democratic Party.

14. The defendants, Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricki, David Barrera and Dorothy Reed are members in and supporters of the Cook County Democratic Party and are Chicago-Cook County Illinois voters.

FACTUAL ALLEGATIONS

15. The Harold Washington Party (HWP), voters, members and supporters are a predominantly African-American political party. The Party was founded and it exists, in part, because of the insults, the disrepect [sic] and the denial of reciprocal political empowerment and benefits to the African-American voters by the Cook County Illinois Democratic Party, to which the African-American HWP members formerly belonged. The HWP was founded and incorporated in Illinois as a political party in 1989. It slated a candidate for Mayor of the City of Chicago in the April 1989 general mayoral election, with nominating petitions which contained the signatures of over 104,000 Chicago registered voters. In the april [sic] 1989 Chicago general mayoral election the HWP mayoral candidate received 330,000 straight HWP votes, and a gross total of 428,000 votes. The HWP thereby became an established political party in the City of Chicago, under the Illinois Election Code, Ch. 46, Sec. 10-2, Ill. Rev. Stat.

16. To expand itself as an established political party into Cook County Illinois, the HWP on August 6, 1990, filed in the office of the Cook County, Illinois Clerk its nominating petitions which contained over 60,000 Chicago and

Cook County registered voters' signatures to have its therein named candidates placed on the November 6, 1990, ballot for the Cook County, Illinois offices of President County Board, Sheriff, State's Attorney, Assessor, Clerk, Treasurer, Superintendent of Education, Commissioners of the Board of Appeals, County and City Commissioners of the Cook County Board, and the Water Reclamation District.

17. The Chicago, Cook County and Illinois Democratic Party Leaders publicly and privately represented and stated to the media and the general public that they and the Democratic Party would not interfere with or attempt to prevent the HWP being on the November 6, 1990 election ballot for various reasons, one being an expressed fear by them of a black voter backlash and aggravated hostility of Chicago, Cook County and Illinois African American voters against the Democratic Party and the Democratic Party candidates in the November 6, 1990 general election. Such representations and statements were false and were deliberately designed to deceive the public and particularly the African American community and voters.

18. As hereinafter revealed in more specific detail, the Chicago and Cook County Democratic Party leaders sneakingly, surreptitiously and clandestinely hired Attorney George N. Leighton, an African American, to keep the HWP and its candidates off the November 6, 1990 ballot, through his representation of five innocuous voters, defendants Valerie A. Sutton, Patton L. Fleichter [sic], Ervin S. Ricke, David Barrere [sic] and Dorothy Reed, registered voters of Chicago, Skokie and Elk Grove, Illinois, who ostensibly objected to the HWP and the

HWP candidates being on said ballot. The Cook County Democratic Party leaders did not retain Attorney Ray Simon, the Cook County Democratic Party attorney, or a large prestigious white law firm in this endeavor as would ordinarily be expected; rather it hired African American Attorney George N. Leighton.

19. The Cook County Democratic Party leadership defendants sought to make it publicly appear as though the said five Cook County voter-Objectors, simply pursuant to their civic duty, retained Attorney Leighton and prevailed upon him to represent them in their objections to the HWP nominating petitions filed with the Cook Counrty [sic] Board of Elections, and that Atty. Leighton, pursuant to his professional and civic duties, did so Pro Bono. But all this was false and not so, as established as hereinafter set forth.

20. During the week following August 6, 1990 when the HWP filed its nominating petitions for it and its candidates to be placed on the November 6, 1990 ballot, defendants Cook County Democratic Party Chairman, Thomas Lyons and Cook County Democratic Party Attorney Raymond Simon, and numerous other Democratic Party leaders, conspiratorially and falsely stated and repeated to the public, in private and to the media that they and the Democratic Party had no objection to and would not oppose the HWP and its candidates being on the November 6th ballot, to avoid incurring the wrath of the Chicago Cook County African American voters.

21. On August 13, 1990, the last day for filing objections against the HWP nominating petitions, Atty. Leighton appeared in the Office of the Cook County Clerk with the

Objectors' verified objections and approximately 6000 *"Appendix Recapitulation"* sheets of the HWP nominating petitions supporting their objections. Atty. Leighton was accompanied to the Board of Election office by Judge Charles Freeman, an African American and Cook County Democratic Party candidate for the Illinois Supreme Court in the November 6, 1990 election.

22. Atty. Leighton and Judge Freeman held a press conference while in or near the County Clerk's office, at which time Atty. Leighton issued the following press release:

"STATEMENT OF ATTORNEY, GEORGE N. LEIGHTON

> I am here (in the Cook County Clerk's Office) today on *behalf of five City and Suburban objectors* to file objections to the nominating petitions submitted by the 'so-called' Harold Washington Party. As a Chicagoan, as an African-American, and as a friend and associate of the late Mayor Harold Washjington [sic], I refuse to sit by idly and let the good name of this great man be besmirched.
>
> I can say without reservation that the late Mayor would not have approved of this effort, that his legacy is not enhanced by this charade, and that black empowerment is not furthered by this thinly-veiled attempt to divide the African American Community of Chicago and Cook County.
>
> Our objections will clearly demonstrate that the submittal put forth on August 6, 1990 is legally flawed in that it fails to meet the criteria set forth in Illinois Election Law; and further,

that these Petitions contain wholesale irregularities.

Quite candidly, I am outraged by the use of Mayor Washington's name in connection with this matter; and I call upon my fellow African Americans to join me in denouncing this deplorable and divisive ruse.

I am confident that the Electoral Board will sustain our objections and I look forward to vigorously contesting this matter.

With me today is Justice Charles Freeman, Democratic Party Candidate for Justice of the Illinois Supreme Court."

(Underscore added)

II. This foregoing press news media release by Atty. Leighton was a nothing but a subterfuge and a realisticaly [sic] deceptive news media hype and publicity stunt, because as a practical matter, as hereinafter disclosed, Atty. Leighton appeared in the County Clerk's office to file the objections at the request, ehest [sic] and instigation of and on behalf of the Cook County Democratic Party, the Cook County Democratic Party Chairman, Tom Lyons, and the Cook County Democratic Party Attorney, Ray Simon.

23. Judge Charles Freeman appeared in the County Clerk's office with Attorney Leighton at the instigation and request of a member and leader of the Cook County Democratic Party and at this time stated to the audio, print and visual media that he was present with Atty. Leighton for the filing of the objections to the HWP petitions because the HWP and its candidates' appearance on the November 6, 1990 ballot would adversely

impact on his ability to win his election for Illinois Supreme Court Justice.

24. At this time, August 13, 1990, in the Cook County Clerk's office Atty. Leighton filed the verified objections of the said objector defendants and the approximately 6000 *"Appendix Recapitulation"* sheets in support of the objections.

25. The objections alleged that the HWP nominating petitions were legally insufficient on the following six grounds.

The petitions:

1. Did not contain a judicial slate.

2. Did not contain the requisite 25,000 suburban signatures.

3. Illegally contained the name, Harold Washington Party, of the established Harold Washington Party.

4. Contained the name R. Eugene Pincham, an ineligible candidate.

5. & 6. Contained illegal, improper, non genuine signatures of unregistered voters, etc.

26. The HWP filed motions to strike and dismiss objections 1 and 4 on legal grounds, on which the Electoral Board heard arguments of counsel and took the HWP's motions to strike and dismiss under advisement.

27. As to objections Nos. 5 & 6, i.e., the HWP's nominating petitions contained illegal, improper, non-genuine signatures and unregistered voters, etc., the HWP filed a motion to strike and dismiss objections 5 & 6 on the

expressed ground, inter alia, that **the Objectors' 6000 *"Appendix Recapitulation"* sheets, filed in support of the objections, were glaringly, obviously, flagrantly and prima facie fraudulent, in that they were all photo-copies-exact duplicates of one original.**

28. The 6000 *"Appendix Recapitulation"* sheets, Nos. 1-6000, were the Objectors' recapitulations of the corresponding 1-6000 HWP nominating petitions, and they obstensibly [sic] specified the alleged defects in the signatures on the corresponding nominating petitions.

29. Each of the Objectors' *"Appendix-Recapitulation"* sheets, 1 thru 6000, revealed, under the column "Signer not registered at address shown" the exact and same

(1) At Line 1, the X protrudes at the right bottom into the left column designated "Signer not in District:"

(2) At Line 4, the X at the bottom right does no extend to the bottom of line 4:

(3) At line 4, there is a vertical line at the left side of the column:

(4) At line 7, the X at the bottom left extends beyond the column line and into the number 7 line.

(5) At line 10, the X at the left bottom extends across the column line and into the No. 10 column, and does not extend to the bottom line of the column.

30. Each of the objectors' *"Appendix-Recapitulation"* sheets, 1 thru 6000, revealed under the column "Signature not proper person and not Genuine", the exact and same:

(1) At line 1 the bottom right X extends into the adjacent right column, designated "Incomplete Address."

(2) At line 7 the bottom left of the X extends into the adjacent left column, designated "Signer not in District."

(3) At line 8 the upper left of the X extends into the adjacent left column, designated "Signer not in District" and also extends into line 7.

(4) At line 8 the bottom right of the X extends into the right adjacent column, designated "Incomplete Address."

31. It is evident from the foregoing, as well as from a mere cursory examination of the Objectors' 6000 "*Appendix Recapitulation*" sheets, that they, each and every one, were photostatic duplicate copies of one and the same original; that the Objectors photocopied an original" [sic] *Appendix Recapitulation*" sheet which when photocopied had the X's inserted in lines 1 thru 10, under the columns "Signer not registered at Address Shown" and "Signatures not proper person and not Genuine"; that thereafter the "*Appendix Recapitulation*" photostatic copies were numbered at the top left under "Sheet No.", numbers *1* thru *6000*; and that the Objectors' 6000 "*Appendix Recapitulation*" sheets were fraudulent and illegal.

32. On August 13, 1990, when the objections were filed, the defendants and no one else had checked or compared any address or signature on the HWP petitions with any address or signature of any registered voter on the official voters' registration card, commonly referred to as the

binder, and that there, therefore, could not have been a valid or reasonable determination that the "Signer (was) not registered at Address Shown," Or that the:"Signature [sic] (was) not the Proper Person and not Genuine", as stated in the *"Appendix Recapitulation"* sheets; and additionally, that no one checked with or ascertained from any signator or any circulator of the HWP petitions, or from any other source, that such signature was "Not registered at the Address Shown" or that the "Signature (was) not (that of the) proper person and not Genuine."

33. The objector-defendants failed to state who did the recapitulations; who prepared the 6000 *"Appendix Recapitulation"* sheets, how, under what circumstances, where and by whom the recapitulation and/or the appendix were prepared.

34. The Election board held an evidentiary hearing on the HWP's motion to dismiss the objections based on the HWP's allegations that the Objectors' 6000 *"Appendix Recapitulation"* sheets were fraudulent. On the evidentiary hearing the Objectors through their attorney, Attorney Leighton, called defendant, Mrs. Bonne McGuire as a witness.

35. McGuire's following uncontradicted testimony established, inter alia, that the objections to the HWP nominating petitions were filed at the clandestine, surreptitious, sneaky ins .gation of, on behalf of and at the behest and request the hereinafter mentioned officials of the Democratic Party of Cook County, Illinois, and that they were the true objectors to the HWP nominating petitions, rather than the five innocuous objector voters.

36. McGuire testified that she lived at 2838 West 85th Street, Chicago, Illinois, and that for 12 years she had been and was the secretary to Chicago (southwest side) 18th Ward Alderman and Democratic Committeeman, Robert Kellam. Her husband was Manager of Midway Airport and four of her six children, whom she named, held city-political jobs, which jobs she identified.

37. McGuire stated that on August 8, 1990 she received at her 18th Ward Democratic office a telephone call from defendant Thomas Lyons, Chairman of the Cook County Democratic Party and Chicago 45th Ward Democratic Party Committeeman. Lyons asked her if she would review and check the HWP Petitions for irregularities and inacuracies [sic], such as fraudulent signatures, improper circulators, signers not registered at address shown and signatures not proper person and not genuine. Defendant McGuire testified that she knew that the Cook County Democratic Party leaders did not want and opposed the HWP and its candidates being on the November 6, 1990 election ballot.

38. Defendant Tom Carey, Administrative Aid to Cook County Democratic Party Chairman, Defendant Thomas Lyons, purchased for over $1400 of Democratic Party Funds, photocopies of the HWP nominating petitions from the Election Board and delivered them to Chairman Lyons at the Democratic Party headquarters on LaSalle Street in downtown Chicago, on August 7, 1990.

39. Defendant McGuire requested and Defendant Lyons furnished her with photocopies of the HWP petitions, Chicago Poll Sheets and Key Book, which were picked up by one of the McGuire's sons at Lyons' Cook County

Democratic Party headquarters. McGuire related that her son brought the HWP petitions, the Poll Sheets and the Key Book to her at the Chicago 19th Ward Democratic Party office of Chicago 19th Ward Democratic Committeeman, Thomas Hynes, who is the Democratic Party nominee for Cook County Assessor in the November 6, 1990 election. The 19th Ward Democratic office of Democratic Party Committeeman Hynes, to which Chairman Lyons sent McGuire the HWP petitions, poll sheets and key book, was also the office of Chicago 19th Ward Alderman Michael Sheahan, the Democratic Party candidate for Cook County Sheriff in the November 6, 1990 election. McGuire stated that Sheahan was in the office when her son brought the HWP petitions, etc. to her and that she prepared a master *Appendix-Recapitulation* form and made many photocopies thereof in Sheahan's office.

40. McGuire further testified that she, with others under her supervision, at random, checked some of the HWP petitions and prepared recapitulation sheets of her examination and that she affixed a number to each recapitulation sheet, which number corresponded with the number on the HWP nominating petition that she examined. These McGuire *"Appendix Recapitulation"* sheets are not the 6000 fraudulent photostatic copy *"Appendix Recapitulation"* sheets hereinbefore mentioned and referred to.

41. McGuire related that for each HWP nominating petition and recapitulation sheet, that is, for every nominating petition signature that she examined, she indicated on every recapitulation sheet thereof, that the *"signature (was) not proper person and not genuine"*, even though she admitted that she had absolutely no factual or evidentiary basis therefor. McGuire further admitted that her

HWP nominating petition recapitulations, "Signatures not proper person and not genuine", were inaccurate, incorrect and false, and were known by her to be so.

42. Defendant Mcguire [sic] testified that on Monday, August 13, 1990, she took the HWP nominating petitions and her recapitulation sheets thereof to the downtown law office of Defendant Attorney Ray Simon, former Chicago Corporation Counsel under the late Mayor Richard J. Daley, the attorney for the Cook County Democratic Party and current campaign Chairman of Democratic Party gubernatorial candidate Neil Hartigan in the November 6, 1990 general election. II. **McGuire related that she knowingly, falsely stated in her recapitulation sheets of the HWP nominating petitions that all of the signatures she examined on the HWP nominating petitions were "not the right person and not genuine" after she called and talked to defendant, Atty. Michael Gary and he told her to do so.**

43. McGuire discussed with Attorney Simon the HWC [sic] nominating petitions and her recapitulation sheets thereof. While in Simon's office, McGuire testified that she saw the 6000 other recapitulation sheets of the HWP petitions, hereinbefore mentioned and which the HWP contended were fraudulent. McGuire acknowledged that these *Simon, "Appendix Recapitulation"* sheets were exact, duplicate, photocopies, except the recapitulation sheet numbers corresponded to the HWP petition numbers. McGuire additionally acknowledged that all the *Simon "Appendix Recapitulation"* sheets stated that all the HWP petition signatures, "Signer not registered at address shown", and "Signatures not proper person and not genuine."

44. McGuire related that pursuant to Attorney Simon's directions, she went to Attorney Leighton's office and turned over to him, the attorney for the Objectors, the recapitulation sheets prepared by her.

45. Atty. Simon, the attorney for the Cook county Democratic Party, (or his firm) did not represent the defendants. Likewise, McGuire gave no evidentiary explanation for Atty. Simon directing her to go to and take her recapitulation sheets to Atty. Leighton.

46. McGuire testified that she did not tell Atty. Leighton or the Objectors whom she saw in Atty. Leighton's office, that her recapitulation sheets contained inaccurate, incorrect and false information.

47. The McGuire *"Appendix Recapitulation"* sheets prepared by McGuire, and the 6000 Simon *"Appendix Recapitulations"* which McGuire saw in Atty. Simon's office and which the HWP contended were fraudulent photocopies, were filed in suport [sic] of the Objectors' objections. When, by whom, where or under what circumstances the Simon *"Appendix Recapitulation"* sheets were prepared or the circumstances of them being in Atty. Simon's office were not revealed by the evidence before the Electoral Board.

48. Although Atty. Leighton initially presented and stated that he would call two witnesses on the evidentiary hearing, he did not do so. McGuire was the only witness called by him. He offered no explanation for not calling his second witness. Nor did he offer one scintilla of evidence to explain, justify, dispute or contradict that the Simon *"Appendix Recapitulation"* sheets were all exact photocopies and were prima fraudulent.

49. Atty. Leighton presented no evidence of from whom, when, how or under what circumstances the Simon *"Appendix Recapitulation"* sheets were received by him from Simon's office for filing by him in support of the objections.

50. On several instances during her testimony the Board Chairman advised Bonnie McGuire of her constitutional rights against self-incrimination and to an attorney, and she repeatedly interrupted her cross examination testimony to consult with an attorney.

51. Upon conclusion of the evidentiary hearing and arguments of counsel, the Election Board rendered its written decision, a copy of which was submitted with the filing of the complaint herein. **The Election Board's decision overruled the Objectors' objections and sustained the HWP motion to strike and dismiss paragraphs 5 and 6 of the Objectors' objections, stating, inter alia, at page 16:**

> **"The HWP moved to dismiss the signature allegations on the basis that they were fraudulent. *The Board noted* the extensive nature of the objections and *the apparent similarity to all of the objections, along with the fact that every single name was objected to for the same reasons.* Consequently, the Board ordered that an evidentiary hearing be held to demonstrate how the objections were researched."**

And at pages 14-15:

> "The Objectors filed objections to all 44,000 City/County HWP signatures on the basis that the signatures were not signed in the voter's own proper persons and that the signers were

not duly registered voters. The Objectors filed 6000 *"Appendix Recapitulation"* sheets corresponding to the sheets of the HWP petitions, on which an X was marked in each box corresponding to these allegations. In fact, the ***Board finds from the evidence presented that the Appendix Recapitulation sheets were photocopies from a "master sheet." The Objectors' contention that every one of the signatures filed by the HWP was invalid strains credulity. Even in the most blatant cases of petition fraud, some signatures will be valid.*** The candidates themselves can be presumed to have signed their own petitions." (Emphasis ours.)

52. The Board sustained the HWP's motion to strike an [sic] dismiss objectors' objections Nos. 5 & 6 on the grounds urged by the HWP, i.e., that said objections were fraudulent, and further stated in its decision:

> **"The objectors' only witness on this point was Mrs. Bonnie McGuire, an aldermanic assistant.** Mrs. McGuire was a credible witness. She testified that she had extensive experience in petition challenges, and that she reviewed a small sampling of the HWP petitions against February, 1990 poll sheets. She also testified that no signatures were checked against the permanent binder cards to determine if the signature was not, in fact, the signature of whom it purported to be. She prepared these objections and tendered them to a **Mr. Michael Carey and Mr. Ray Simon. Mr. Carey instructed her to insert additional objections so that every signature was objected to under the designation "Not Signed In Own Proper Person." Mrs. McGuire rightfully questioned this practice, since her limited, though thorough review had only**

resulted in the smaller number of objections she listed. Mrs. McGuire testified that Mr. Carey insisted that the additional signatures should be objected to so as to "preserve the objection for the record."

Mrs. McGuire also testified that she met the objectors only briefly at Raymond Simon's office. She explained her research to one of the objectors. Some of the objectors were not even present. Obviously, there was no way for these objectors to have obtained the information relevant to their objections other than through Mrs. McGuire. However, these objectors swore under oath that the objections were true. This lack of knowledge of the nature and accuracy of the objections gives the Board even more reason not to order a binder check. No further evidence was presented by the objectors who rested his case after the Chairman of the Board repeatedly offered the opportunity to proceed and preent [sic] evidence through witnesses on documents or otherwise. The objectors presented no evidence which would substantiate the (objectors') allegations (that the signatures on the HWP nominating petitions were invalid, etc.) Or shift the burden to answer to the HWP."

53. The objectors did not seek judicial review of the Board's decision dismissing objections Nos. 5 & 6 based on the objectors' fraudulent "Appendix Recapitulation" sheets and the Electoral Board's aforesaid determinations thereof and thereon are therefore final.

54. The defendants' aforesaid acts and conduct, clandestine and overt, legal and illegal, individual and conspiratorial, to prevent the HWP and its candidates being on

the Cook County, Illinois November 6, 1990 general election ballot tremendously handicapped and adversely impacted on the campaign's.

55. The defendants' aforesaid acts and conduct, clandestine and overt, legal and illegal, individual and conspiratorial were willfully, wantonly, wickedly and maliciously committed by defendants to improperly prevent the HWP and its candidates from being on the Cook County, Illinois November 6, 1990 general election ballot, and the fraud in which the defendants engaged in furtherance of their efforts was massive, glaring, clear and obvious, and by reason thereof and to prevent and discourage a repitition [sic] or further commission of such a similar fraud and egregious and outrageous conduct by the defendants, or by others, punitive damages should be imposed in favor of the HWP and its candidates, plaintiffs Barbara Norman, et al, such as dismissing and even causing cancellation of many of the campaign speaking engagements, campaign contributions and campaign volunteer workers, subjecting them to public ridicule, scorn, humiliation and indignations and decreasing their opportunities for election, contrary to the desires and rights, the tremendous labor and support of the HWP and its candidates, plaintiffs Barbara Normanm [sic], et al, plaintiffs Timuel Black, et al, signers of the HWP nominating petitions, plaintiffs Fannie O'Bannon, et al, supporters and voters of the HWP and its candidates and plaintiffs O.B. Roberts, et al, circulators of the HWP nominating petitions and against the defendants, and they should be permanently enjoined from again engaging in such similar reprehensible conduct.

Prayer for Relief

By reason of the above and foregoing, plaintiffs pray that:

1. Judgment in the amount of $10,000,000 be entered in favor of plaintiffs and each of them against the defendants and each of them for plaintiffs' actual damages.

2. Judgment in the amount of $10,000,000 be entered in favor of plaintiffs and each of them against the defendants and each of them.

3. Defendants and each of them be permanently enjoined from again engaging in acts and conduct of the kind by them herein mentioned.

4. The Court enter such other and further relief, order, decree or judgement [sic] as the Honorable Court shall deem appropriate and proper to render justice in the cause, to protect plaintiffs' rights and the public's interest.

/s/ Barbara J. Norman
Plaintiff

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Supreme Court, U.S.
FILED
JUL 14 1992
OFFICE

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92-1992

No. ~~91-2712~~

In The

Supreme Court of the United States

October Term, 1993

THE HAROLD WASHINGTON PARTY, ET AL.,

Plaintiffs-Petitioners,

vs.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, ET AL.,

Defendants-Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners' failure for four months, to file a response to a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the complaint justified a refusal to vacate the judgment of dismissal under Rule 60(b).

2. Whether the refusal to vacate the dismissal under Rule 60(b), in accordance with well settled precedent, calls for an exercise of this Court's power of supervision.

3. Whether, under Rule 23 of the Federal Rules of Civil Procedure, the involuntary dismissal of the complaint required notice to a putative class which was not and was never requested to be certified and where that contention was not raised in the district court.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

OBJECTIONS TO JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 2

I

THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION 2

II

THE REFUSAL TO VACATE UNDER RULE 60(b) WAS PROPER AND IN ACCORD WITH WELL ESTABLISHED PRECEDENT 3

III

NOTICE OF INVOLUNTARY DISMISSAL TO THE PURPORTED CLASS WAS NOT REQUIRED 5

CONCLUSION 7

APPENDIX ..... App. 1

Court of Appeals Opinion Sought to be Reviewed ..... App. 1

Memorandum Opinion of the District Court .. App. 14

Joint Brief of Respondents in the Court of Appeals ..... App. 18

TABLE OF AUTHORITIES

Page

Baham v. Southern Bell Tel. & Tel. Co.,55 F.R.D. 478 (W.D.La. 1972) 5

Cannon v. U.S. Acoustics Corp.,532 F.2d 1118 (7th Cir. 1976) 6

C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202 (7th Cir. 1984) 3

Clergy and Laity Concerned v. Chicago Bd. of Educ.,586 F.Supp. 1408 (N.D. Ill. 1984) 3

Flett v. W. A. Alexander & Company, 302 F.2d 321 (7th Cir. 1962) *cert. denied*, 371 U.S. 841 3

Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co., 508 F.2d 417 (7th Cir. 1975) 6

Kostenbauder v. Secretary of H.E.W., 71 F.R.D. 449 (MD Penn. 1976) 3

Laventhall v. General Dynamics, 91 F.R.D. 208 (E.D. Mo. 1981) affirmed, 704 F.2d 407, *cert. denied*, 311 U.S. 700 5

North Central Illinois Laborers' District Council v. S. J. Groves, 842 F.2d 164 (7th Cir. 1988) 3

Partridge v. St. Louis Joint Stock Bond Bank, 130 F.2d 281 (8th Cir. 1942) 5

Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (7th Cir. 1940) 5

Western Transportation Company v. E.I. DuPont de Nemours and Company, 682 F.2d 1233 (7th Cir. 1982) 3

Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc., 925 F.2d 226 (7th Cir. 1991) 3

OPINIONS BELOW

1. The unreported opinion of the United States District Court entered on June 15, 1991, refusing to vacate dismissal of the complaint under Rule 60(b). (App. 14)

2. The reported opinion of the Court of Appeals entered on January 29, 1993 affirming the district court. (984 F.2d 875; App. 1)

OBJECTIONS TO JURISDICTION

The petitioners urge, disingenuously and without citation of authority, that the proceedings below so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The asserted jurisdictional ground is specious.

The decisions below were in accordance with long standing precedent and were plainly correct.

No basis for jurisdiction has been or can be asserted.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate, incomplete and materially misleading. A full and accurate statement of the case, with record references, is set forth in the brief filed by respondents in the Court of Appeals. (App. 20-31)

In short, the complaint filed in the district court was without merit and was virtually abandoned by petitioners. A Rule 12(b)(6) motion to dismiss the complaint, together with supporting memorandum, was filed by respondents on November 30, 1990. Four attorneys represented the petitioners. More than four months passed without a response to the motion, despite three orders requiring a response. On April 5, 1991, the district court dismissed the complaint. Seventeen days later, petitioners moved to vacate the dismissal under Rule 60(b)(1) claiming "excusable neglect". Only one of the attorneys for petitioners offered any excuse and his excuse was transparently inadequate to justify the total disregard for the orders of the district court. The three other attorneys never offered any reason to excuse their conduct. The Court of Appeals affirmed on January 23, 1993.

ARGUMENT

I

THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION

Both the district court and the Court of Appeals applied well settled precedent in refusing to vacate the judgment of dismissal. No constitutional deprivation is urged. No important question is presented. The decision does not conflict with the decision of any other court. There plainly has been no departure from the accepted and usual course of judicial proceeding as to call for this Court's exercise of its power of supervision. Thus, there

is absolutely no basis for this Court to take jurisdiction of this matter.

II

THE REFUSAL TO VACATE UNDER RULE 60(b) WAS PROPER AND IN ACCORD WITH WELL ESTABLISHED PRECEDENT

The issue before the Court of Appeals was whether the district court abused its discretion in refusing to vacate a judgment of dismissal under Rule 60(b). The opinion of the Court of Appeals is set forth in the Appendix hereto at page 1. Both the district court and the Court of Appeals applied well settled precedent in holding that the petitioners failed to demonstrate any basis for vacating the judgment. *Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 230 (7th Cir. 1991); *North Central Illinois Laborers' District Council v. S. J. Groves*, 842 F.2d 164 (7th Cir. 1988); *Clergy and Laity Concerned v. Chicago Bd. of Educ.*, 586 F.Supp. 1408 (N.D. Ill. 1984); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984); *Western Transportation Company v. E.I. DuPont de Nemours and Company*, 682 F.2d 1233, 1236 (7th Cir. 1982); *Kostenbauder v. Secretary of H.E.W.*, 71 F.R.D. 449 (MD Penn. 1976); *Flett v. W. A. Alexander & Company*, 302 F.2d 321 (7th Cir. 1962) *cert. denied*, 371 U.S. 841.

The district court held (App. 16-17):

> "Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the plaintiffs three months to respond to the defendants' motion to dismiss. Finally, after a month of silence following the

plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of "mistake, surprise or excusable neglect". The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to a motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied."

The Court of Appeals held (App. 12-13):

"Our review of the record does not reveal that the district court relied on forbidden factors or failed to consider any important relevant factor in denying the Plaintiffs' motion to vacate. *See Tolliver v. Northrop Corporation*, 786 F.2d 316, 319 (7th Cir. 1986). The only ground listed in Rule 60(b) addressed by the Plaintiffs was "excusable neglect". *See* Federal Rule of Civil Procedure 60(b)(1). And, as the district judge pointed out,

what may arguably have been excusable neglect on the part of the lead counsel could not excuse or explain the neglect on the part of the other three counsel of record.

* * *

When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be tempted to engage in such conduct. *See National Hockey League v. Metropolitan Hockey League Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

In this instance the Plaintiffs had four months to argue the merits of their claims. Offering their response only after judgment had been granted did not demonstrate the diligence or extraordinary circumstances necessary to invoke Rule 60(b)."

III

NOTICE OF INVOLUNTARY DISMISSAL TO THE PURPORTED CLASS WAS NOT REQUIRED

The complaint was styled as a class action. However, appellants made no attempt to obtain class certification and there is grave doubt that the complaint could ever satisfy the requirements of Rule 23. In any event, a putative class is not entitled to notice of an involuntary dismissal. *Laventhall v. General Dynamics*, 91 F.R.D. 208, 210 (E.D. Mo. 1981) *affirmed*, 704 F.2d 407, *cert. denied*, 464 U.S. 846; *Baham v. Southern Bell Tel. & Tel. Co.*, 55 F.R.D. 478 (W.D. La. 1972); *Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940) *cert. denied*, 311 U.S. 700; *Partridge*

v. St. Louis Joint Stock Bond Bank, 130 F.2d 281, 286 (8th Cir. 1942) In addition, the argument was never raised in the trial court and, therefore, was waived. *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir. 1976).

The Court of Appeals further held (App. 8-9):

> "As a threshold matter, the Plaintiffs point out that because this case was filed as a Class action, the district court erred when it dismissed the complaint with prejudice without addressing the issue of class certification or notifying the putative class. *See* Federal Rule of Civil Procedure 23(c)(1). This argument raises the question of whether there is a final judgment over which this court has jurisdiction. *See* 28 U.S.C. § 1291. If the district court has indicated that it contemplates additional proceedings to address the class issue, its judgment is not final for purposes of appeal.
>
> In this case the district court never addressed the class certification issue and did not specifically reserve that question. Our cases hold that, absent a reservation of the class certification issue, the district court's failure to certify the class does not render the district court's judgment nonfinal, but merely limits the scope of the judgment in that the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants. *See*, e.g., *Rutan v. Republican Party*, 868 F.2d 943 (1989) (en banc), *aff'd in part and rev'd in part on other grounds*, 497 U.S. 62 (1990); *Currie v. Diamond Mortgage Corporation*, 859 F.2d 1538 (7th Cir. 1988); *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1987). Accordingly, we have jurisdiction to consider this appeal."

CONCLUSION

For the foregoing reasons and for the reasons urged by respondents in the Court of Appeals, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

(i)

THE OPINION OF THE COURT SOUGHT TO BE REVIEWED

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2712
THE HAROLD WASHINGTON PARTY, et al.,

Plaintiffs-Appellants,

v.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90-C-5731 – **Charles P. Kocoras,** *Judge.*

ARGUED JANUARY 17, 1992 – DECIDED JANUARY 29, 1993

Before FLAUM and MANION, *Circuit Judges,* and CURRAN, *District Judge.**

CURRAN, *District Judge.*

---

* The Honorable Thomas J. Curran, District Judge for the Eastern District of Wisconsin, is sitting by designation.

A. BACKGROUND

The Harold Washington Party (HWP), named after a deceased Chicago mayor, is a fledgling Chicago political party whose voters, members and supporters are predominantly African-Americans. The party was founded and incorporated in Illinois as a Chicago political party in 1989. As the November 6, 1990, general election approached, the party attempted to become a political presence in Cook County, Illinois, as well as in the City of Chicago, by slating candidates for the positions of Cook County Sheriff, State's Attorney, Assessor, Clerk, Treasurer, Board President, as well as other offices.[1] Nominating petitions containing over 60,000 signatures were filed on behalf of these candidates.

The case before us arose out of the efforts of the Chicago Cook County Democratic Party (CCCDP) to remove the Harold Washington Party candidates from the Cook County November 6, 1990, general election ballot. The background of this dispute, as recounted by the

---

[1] Under Illinois law, citizens wishing to organize a "new political party" must collect approximately 25,000 signatures from voters in the political unit in which the party intends to slate candidates for office. If enough valid signatures are collected, the organization becomes a "new political party" under Illinois law. *See* Ill. Rev. Stat., ch. 46, § 10-2 (1989). If the party gathers five percent of the vote in the next election, it becomes an "established political party." *Id.* However, a "new" political party can become "established" only in the political subdivision where it has fielded candidates. Thus, prior to the November 6, 1990, general election, the Harold Washington Party was not an established party in Cook County, Illinois, even though it had become established in the City of Chicago municipal elections.

Illinois Supreme Court in a related action, evolved as follows:

> On August 6, 1990, Barbara J. Norman and others (the Party) filed petitions to place their names on the November 6, 1990, election ballot as candidates for office under the HAROLD WASHINGTON PARTY (Washington Party) name. The Washington Party candidates filed as a "new" political party in Cook County under article 10 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-1 et seq.), even though the Washington Party was already an established party in the City of Chicago. The Washington Party fielded candidates for all nonjudicial, countywide offices, and for county commissioners to be elected at-large within the City of Chicago (city commissioners), county commissioners to be elected at-large from outside the City of Chicago (suburban commissioners) and commissioners of the Water Reclamation District of Greater Chicago.
>
> Dorothy Reed and others (the objectors) filed objections to the Washington Party candidates' nomination pursuant to section 10-8 of the code, contending that the Washington Party petitions lacked the requisite number of signatures, and had failed to meet other requirements of section 10-2 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-2).
>
> The Cook County officers electoral board (the board) examined the objections and held that the Washington Party candidates were entitled to appear on the November ballot, with the exception of candidates for the water district and the suburban-district commissioners. The board found that the Washington Party had

failed to gather the necessary number of petition signatures from within those districts in support of those candidates.

The objectors appealed the board's decision to the circuit court of Cook County. That court, in an order filed on September 20, 1990, affirmed the board's decision in part and reversed it in part. It held that the failure of the suburban commissioners' candidacy and the failure to present judicial candidates resulted in a failure by the Washington Party to submit a "complete slate" of candidates as required by section 10-2 of the Code, and that therefore all Washington Party candidates were ineligible for the ballot.

This court then reviewed the circuit court's decision pursuant to Illinois Supreme Court Rule 302(b) (134 Ill.2d R. 302(b)), and issued an order filed on October 12, 1990, affirming the circuit court's decision on two separate grounds. First, this court held that the Washington Party candidates could not use the Washington Party party name because it was the name of an "established political party," in violation of section 10-5 of the Code. Second, this court held that the failure of the suburban commissioners' petitions resulted in the Washington Party's failure to file a complete slate of candidates and that, therefore, its nomination papers did not comply with section 10-2. As a result, this court found it unnecessary to address the remaining points raised on appeal, among them being whether the Washington Party's failure to slate judicial candidates was fatal to its candidates' petitions.

Reed v. Kusper, No. 70833, 1992 WL 356050 at *1 (Ill. December 4, 1992) (ruling after remand).

Shortly thereafter, the United States Supreme Court granted certiorari, stayed the order of the Illinois Supreme Court, and ordered that the Harold Washington Party candidates be listed on the November 6, 1992 ballot. On January 14, 1992, the Supreme Court issued an opinion upholding the decision of the Cook County Officers Electoral Board. *See Norman v. Reed*, 112 S. Ct. 698 (1992).

Meanwhile, on October 1, 1990, the appellants[2] filed the instant action in the United States District Court for the Northern District of Illinois alleging that the Cook

---

[2] The purported Plaintiffs-Appellants are: The Harold Washington Party; Barbara Norman, a HWP candidate and representative of a class of HWP candidates in the November 6, 1990 election; Timuel Black, a HWP nomination petition signer and representative of a class of signers of HWP nominating petitions for the November 6, 1990 election; Fannie O'Bannion, a HWP supporter and voter; and O.B. Roberts, a HWP petition circulator and representative of a class of circulators of the HWP nominating petitions for the November 6, 1990 election.

This circuit holds that Federal Rule of Appellate Procedure 3(c) requires, as a matter of jurisdiction, that the caption and notice of appeal, read together, must contain the names of all appellants. *See Albedyll v. Wisconsin Porcelain Company Revised Retirement Plan*, 947 F.2d 246, 253 (7th Cir. 1991). The Plaintiffs' "Notice of Appeal" specifically names only the Harold Washington Party as the appellant. Consequently, the other named Plaintiffs in the district court have forfeited their appeal rights. *See Allen-Archery, Inc. v. Precision Shooting Equipment*, 857 F.2d 1176, 1177 (7th Cir. 1988). Although we will continue to refer to the Plaintiffs-Appellants in the plural, the Harold Washington Party is the only valid Appellant.

County Democratic Party and eleven individuals[3] conspired to keep the Harold Washington Party candidates off the November 6 ballot. The Plaintiffs in the district court sought injunctive and monetary relief pursuant to 42 U.S.C. § 1983 for violations of their constitutional rights guaranteed by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. The Complaint also cites 18 U.S.C. § 231 and 42 U.S.C. §§ 1971 & 1985(2) as avenues of relief. Four attorneys filed notices of appearances on behalf of the Plaintiffs. Lead attorney for the Plaintiffs was R. Eugene Pincham, who ran as the Harold Washington Party candidate for mayor during the pendency of this action.

On November 13, 1990, the Defendants filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. *See* Federal Rule of Civil Procedure 12(b)(1) & (b)(6). At a December 3, 1990, status conference a briefing schedule was set whereby the Plaintiffs were to respond to the motion by January 2, 1991. The briefing schedule was memorialized by a minute order. On January 11, 1991, Attorney Robert E. Pincham, Jr. filed a motion seeking an extension of time in which to respond on the ground that his father, the lead counsel, was recovering from surgery. The court granted the motion and ordered the Plaintiffs to respond by February 1. This schedule was also memorialized as a

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[3] The named Defendants are: the Cook County, Illinois Democratic Party; its chairman Thomas Lyons; its attorneys, Michael Carey and Ray Simmon; its candidate for Cook County Sheriff, Michael Sheahan; its supporter, Bonnie McGuire; and Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricks, David Barrera, and Dorothy Reed, objectors to the HWP petitions.

minute order. On January 23, 1991, the Plaintiffs again moved for an extension of time due to the continuing illness of the lead attorney. Again, the motion was granted and the district judge ordered the Plaintiffs to respond by March 1. After that deadline passed with no response being filed, the Defendants moved for entry of an order granting their motion to dismiss for lack of jurisdiction, for failure to state a claim, and for failure to respond to the original motion to dismiss.

The court heard the Defendants' motion on April 5, 1991, at which time the Plaintiffs asked for another fourteen days in which to respond. This time the court denied the request and granted the motion to dismiss. A final judgment dismissing the action with prejudice was docketed on April 8, 1991.

On April 17, 1991, the Plaintiffs served a motion to vacate the April 5 order dismissing the complaint. This motion was heard on April 22, at which time the Plaintiffs finally responded to the motion to dismiss. In a July 12, 1991, memorandum opinion, the district court decided that this motion was untimely for purposes of Federal Rule of Civil Procedure 59(e),[4] so it considered the

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[4] The parties have failed to note that, while the motion to dismiss was granted on April 5, judgment was not entered on the docket until April 8. *See* Federal Rules of Civil Procedure 58 & 79(a) (a judgment is effective only when set forth as a separate document and entered on the docket). Therefore, excluding weekends, the motion to vacate was filed within the ten day time limit specified in Rule 59(e). Nevertheless, the Plaintiffs vehemently denied that their motion was brought pursuant to Rule 59(e). *See* Plaintiffs' Answer to the Defendants' Objections to Plaintiffs' Motion to Vacate the Order of April 5, 1991

motion under Rule 60(b) and found that the Plaintiffs had not established mistake, surprise, inadvertence, excusable neglect or any other exceptional circumstances. Therefore, the motion to vacate was denied.

On July 19, 1991, the Plaintiffs filed a notice of appeal from the court's order of July 12. The principal issue before us is whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment of dismissal under Rule 60(b). Because we conclude that he did not, we affirm.

B. CLASS ALLEGATIONS

As a threshold matter, the Plaintiffs point out that, because this case was filed as a Class action, the district court erred when it dismissed the complaint with prejudice without addressing the issue of class certification or notifying the putative class. *See* Federal Rule of Civil Procedure 23(c)(1). This argument raises the question of whether there is a final judgment over which this court has jurisdiction. *See* 28 U.S.C. § 1291. If the district court has indicated that it contemplates additional proceedings to address the class issue, its judgment is not final for purposes of appeal.

In this case the district court never addressed the class certification issue and did not specifically reserve that question. Our cases hold that, absent a reservation of the class certification issue, the district court's failure to

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Dismissing Plaintiffs' Complaint at 1-2. Therefore, we cannot say that the district court erred in applying Rule 60(b).

certify the class does not render the district court's judgment nonfinal, but merely limits the scope of the judgment in that the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants. *See, e.g., Rutan v. Republican Party,* 868 F.2d 943 (1989) (en banc), *aff'd in part and rev'd in part on other grounds,* 497 U.S. 62 (1990); *Currie v. Diamond Mortgage Corporation,* 859 F.2d 1538 (7th Cir. 1988); *Gomez v. Illinois State Board of Education,* 811 F.2d 1030 (7th Cir. 1987). Accordingly, we have jurisdiction to consider this appeal.

C. RULE 60(b)

We now turn to the issue of whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment under Rule 60(b). Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

> equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

It is well-established the Rule 60(b) relief "is an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Engineers, Inc. v. White Mountain Gypsum Company*, 726 F.2d 1202, 1205 (7th Cir. 1984). Because district courts must be able to control their own dockets, we give them wide latitude in declining Rule 60(b) motions and review such decisions only for an abuse of discretion. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 228-29 (7th Cir. 1991). An abuse of discretion can be found only where " 'no reasonable person could agree with the district court.' " *Nelson v. City Colleges of Chicago*, 962 F.2d 754, 755 (7th Cir. 1992) (quoting *McKnight v. United States Steel Corporation*, 726 F.2d 333, 335 (7th Cir. 1984)).

At the hearing held on April 5, 1991, the district court did not address the merits of the Defendants' motion to dismiss. Instead, the judge recounted the procedural history of the case, including the two extensions of time granted to the Plaintiffs and their failure to file a response to the motion despite the appearance of four lawyers on their behalf. After chastising the Plaintiffs for this delay and inaction, the judge granted the motion to dismiss. Although the Defendants moved for dismissal on the merits, it is apparent from the judge's remarks that the motion to dismiss was granted pursuant to Federal Rule of Civil Procedure 41(b), which provides that:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The Plaintiffs then filed their motion to vacate the judgment which was subsequently entered on April 8. The Plaintiffs argued that they had a meritorious response to the motion to dismiss; that the Defendants had shown no prejudice; and that their failure to file a timely response to the motion was not willful but was occasioned by the lead counsel's illness and his campaign for the office of mayor of Chicago.

It is July 12 memorandum opinion the court ruled that the Plaintiffs had failed to establish grounds of "mistake, surprise or excusable neglect." As he denied the motion to vacate, the judge observed that, while the lead counsel might have been unable to respond, the other three attorneys who appeared for the Plaintiffs had wholly failed to explain their failure to answer the motion to dismiss.

Following the conclusion of these proceedings in the district court, the only timely notice of appeal filed by the Plaintiffs was from the July 12 order denying their motion to vacate under Rule 60(b). An appeal from the denial of a Rule 60(b) motion does not trigger appellate review of

the merits of the underlying judgment.[5] *See Kagan v. Caterpillar Tractor Company*, 795 F.2d 601, 607 (7th Cir. 1986). Thus, all that is before this court is the district court's refusal to vacate its judgment.

Our review of the record does not reveal that the district court relied on forbidden factors or failed to consider any important relevant factor in denying the Plaintiffs' motion to vacate. *See Tolliver v. Northrop Corporation*, 786 F.2d 316, 319 (7th Cir. 1986). The only ground listed in Rule 60(b) addressed by the Plaintiffs was "excusable neglect." *See* Federal Rule of Civil Procedure 60(b)(1). And, as the district judge pointed out, what may arguably have been excusable neglect on the part of the lead counsel could not excuse or explain the neglect on the part of the other three counsel of record.

The Plaintiffs vehemently maintain that they had a meritorious response to the motion to dismiss, but the existence of a meritorious defense, standing alone, does not excuse carelessness and disregard for court orders and schedules. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 230 (7th Cir. 1991). Similarly, the lack of prejudice to the Defendants is not a factor which lends any weight to the Plaintiffs' position. When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be

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[5] Consequently, the Plaintiffs' argument that the court never *ordered* them to file a brief prior to dismissal is both incorrect and irrelevant as they can no longer appeal from the judgment of dismissal under Rule 41(b) for want of prosecution.

tempted to engage in such conduct. *See National Hockey League v. Metropolitan Hockey League Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

In this instance the Plaintiffs had four months to argue the merits of their claims. Offering their response only after judgment had been granted did not demonstrate the diligence or extraordinary circumstances necessary to invoke Rule 60(b). When a party abdicates its responsibilities through its attorneys' carelessness, relief from judgment under Rule 60(b) is not warranted. *See Zuelzke*, 925 F.2d at 229; *Western Transportation Company v. E.I. DuPont de Nemours and Company*, 682 F.2d 1233, 1236 (7th Cir. 1982). While the facts in this case are not as egregious as some, this court cannot conclude that the district judge abused his discretion or was unreasonable in finding that the Plaintiffs had not established excusable neglect. Therefore, the district court's judgment denying relief under Rule 60(b) Is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

(ii)

THE MEMORANDUM OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

THE HAROLD WASHINGTON PARTY, et al.,	)	No. 90C5731
Plaintiffs,	)	HONORABLE CHARLES P. KOCORAS
vs.	)	
THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,	)	
Defendants.	)	

Memorandum Opinion filed June 15, 1991

This matter is before the court on the plaintiffs' motion to vacate this court's dismissal of the case. For the reasons discussed below, the motion is denied.

BACKGROUND

The plaintiffs filed this action on October 9, 1990 alleging that the defendants had engaged in a conspiracy to keep Harold Washington Party candidates off the November 6, 1990 Cook County ballot. The defendants filed a Rule 12(b)(6) motion to dismiss the complaint on November 13, 1990 and a brief in support of that motion

on November 30, 1990. The plaintiffs were given until January 2, 1991 to file a response to the motion. The deadlines passed without a word from the plaintiffs. On January 11, 1991 the plaintiffs asked to have until January 18, 1991 to file their response. The extension was granted, and the plaintiffs again missed the deadline. Ten days later the plaintiffs returned to court and requested a month and a half to file their brief. This new March 1, 1991 was missed in complete silence.

On April 5, 1991, a full month after the latest deadline, the defendants moved to dismiss the action. Noting the right of litigants to diligence on the part of their opponents in resolving disputes, this court granted the defendants' motion and entered final judgment against the plaintiffs.

Seventeen days later the plaintiffs, through one of their attorneys, R. Eugene Pincham, Sr., filed the instant motion to vacate the April 5, 1991 judgment. Mr. Pincham underwent surgery at the end of November 1990. Then, during his recuperation, he was asked to help Danny Davis in the latter's bid for the 1991 Democratic mayoral nomination. When that bid failed, the Harold Washington Party asked Mr. Pincham to run for mayor under its banner. Mr. Pincham states that these events so occupied his time that he was unable to file a timely response to the defendants' Rule 12(b)(6) motion.

DISCUSSION

A. Legal Standard

The Seventh Circuit and courts of this district adhere to a policy favoring resolution of disputes on the merits.

Chandler Leasing Corp. v. UCC, Inc., 91 F.R.D. 81, 83 (N.D. Ill. 1981). The preference for meritorious resolution of disputes must, however, be balanced against the court's duty to protect and promote efficient litigation that will accrue to the benefit of all litigants. *See North Central Illinois Laborers' District Council v. S.J. Groves & Sons Company*, 842 F.2d 164, 167 (7th Cir. 1980); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984). To effectively perform this duty, courts have the inherent power to dismiss a case "in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not." *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983).

Relief from a final order of dismissal may be obtained only upon a showing of exceptional circumstances as defined by Rule 60(b). *Railroad Maintenance Laborers v. American Railroad Construction Co.*, 96 F.R.D. 433, 435 (7th Cir. 1985). Such circumstances consist of

> (1) mistake, inadvertance [sic], surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misrepresentation or other conduct of the adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

B. Analysis

Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the

plaintiffs' three months to respond to the defendants' motion to dismiss. Finally, after a month a silence following the plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of "mistake, surprise or excusable neglect." The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to a motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied.

/s/ Charles P. Kocoras

In the

United States Court of Appeals

for the Seventh Circuit

No. 91-2712

THE HAROLD WASHINGTON PARTY, et al.,
Plaintiffs-Appellants,

vs.

THE COOK COUNTY DEMOCRATIC PARTY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 5731
The Honorable **Charles P. Kocoras,**
Judge Presiding.

JOINT BRIEF OF APPELLEES

The Cook County Democratic Party, Thomas Lyons, Individually and in his Official Capacity as Chairman of the Cook County Illinois Democratic Party, Tom Carey, Michael Carey, Michael Sheahan, Raymond F. Simon, Bonnie McGuire, Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricks, David Barrera and Dorothy Reed

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* * *

STATEMENT OF THE CASE

On April 5, 1991, the district court dismissed the complaint with prejudice because of a four month failure of the appellants to file any response to the appellees' Motion to Dismiss. On July 12, 1991, the District Court denied the appellants' Motion to Vacate the Dismissal, finding that no showing of "excusable neglect" was made by the four attorneys who represented the appellants and that the appellants, therefore, failed to demonstrate the exceptional circumstances necessary to justify relief from a judgment under Rule 60(b). Appellants appealed from that Order only.

STATEMENT OF FACTS

Appellants' "statement of facts" is plainly violative of Rule 28 of this Court. It is not a "fair summary without argument or comment". It is not limited to "the facts relevant to the issues presented for review". Rather, it is deceptive and materially misleading.

The only Order on review is the Order of July 12, 1991, which denied the appellants' Motion to Vacate the Judgment Order of April 5, 1991. The Order of April 5, 1991 was not appealed and, therefore, is not before this Court. Nonetheless, appellants devoted sixteen pages of their "statement of facts" (pp. 4-19) to events either relating to the Complaint or to collateral events wholly unrelated to this appeal. Moreover, the characterization of those events is substantively untrue. *See:* Memorandum in Support Of All Defendants To Dismiss Complaint

(Appendix hereto, pp. 1a-6a and the Appendix to that Memorandum [R., Vol. 1 of 1, p. 23])

A fair summary of the facts relating to the issues on appeal is as follows:

The Complaint was filed on October 9, 1990 alleging that appellees had engaged in a conspiracy to keep the Harold Washington Party candidates off the November 6, 1990 Cook County ballot. (Memorandum Opinion, p. 1, App., p. 35)[1] All twelve appellees filed a single Rule 12(b)(6) Motion to Dismiss the Complaint on November 13, 1990 and a single brief in support of that Motion on November 30, 1990. (Memorandum Opinion, p. 1, App., p. 35) The names of four attorneys appear on the Complaint as counsel for appellants (Compl., pp. 31-32, R. 1-1, Pleading Vol. 1 of 1) Each of the four attorneys filed a written appearance for appellants. (R. 1-3, Pleading Vol. 1 of 1)

On December 3, 1990, Nathaniel Howse, one of four attorneys representing the appellants appeared before the district court and requested thirty days within which to respond to the Motion to Dismiss. (Supp. R. 58-3, p. 2) Thereupon, the district court entered an Order granting appellants until January 2, 1991 to answer the Motion to Dismiss and set February 15, 1991 for ruling. (R. 24, Pleading Vol. 1 of 1)

The deadline of January 2, 1991 passed without a word from appellants. (Memorandum Opinion, p. 1, App. p. 35) On January 11, 1991, nine days later, the appellants,

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[1] App. refers to the Appendix filed by Appellants.

through another of their attorneys, Robert E. Pincham, Jr., requested an extension of time to respond to the Motion to Dismiss to January 18, 1991. (R. 28, Pleading Vol. 1 of 1) The district court entered an Order, by mail, granting the extension of time. (R. 29, Pleading Vol. 1 of 1)

Again, appellants missed the deadline. (Memorandum Opinion, p. 2, App. p. 35) On January 22, 1991, after the due date, appellants, through R. Eugene Pincham, Sr. requested a further extension to March 1, 1991. The motion for extension was filed with the Clerk on January 22, 1991, but not presented to the district court until January 28, 1991. (R. 34-36, Pleading Vol. 1 of 1) The transcript of January 28, 1991 reflects the following: (Supp. R. 58-4, Vol. 4 of 5)

> "MR. PINCHAM: Good morning, your Honor. If the Court please, I am here on behalf of Harold Washington's motion to extend the time in which to respond to the motion of defendants to dismiss, and we are asking for a March date within which to do that.
>
> * * *
>
> THE COURT: How is your health, Mr. Pincham?
>
> MR. PINCHAM: Well, it aint' what it ought to be. I would like for it to be better than it is, but I am surviving.
>
> THE COURT: Do you have any objection to this?
>
> MR. SPITALLI: I do, your Honor. I am sorry that Mr. Pincham has not been well, but I feel constrained to point out to the Court that there are four attorneys who represent the plaintiff in

> this case. The motion to dismiss has been on file since November 13th. We are now beyond sixty days. It is our firm conviction, your Honor, that this case was irresponsibly filed and should not be left on file for any longer than is necessary. So, we object to this continuance. It is interesting to me that the other three attorneys filed nothing before the Court to indicate what they have been doing over this past 60-some days.
>
> THE COURT: Well, it is a long time. Other lawyers could have done it. I take it you are lead counsel, Mr. Pincham?
>
> MR. PINCHAM: Well, the other lawyers, really – this is a pro bono case. The other lawyers who really were in the case attempted to aid and assist me during the time when we were in the midst of a campaign.
>
> THE COURT: I will grant the motion."

On that same date, the district court issued a minute order providing:

> "Plaintiffs' motion for an extension of time to March 1, 1991 to answer defendants' motion to dismiss is granted. Replies are due March 15, 1991. Ruling reset to April 17, 1991 at 9:30 a.m. (R. 37, Pleading Vol. 1 of 1)

The new March 1, 1991 date was missed in complete silence. (Memorandum Opinion, p. 2 App. 35) On April 3, 1991, a full month after the latest deadline, appellants were personally served with notice of appellees' motion for the entry of an order granting the motion to dismiss because of appellants' " failure to file any Memorandum in opposition to the Motion to Dismiss and for all of the

reasons set forth in the Defendants' Motion and Memorandum in support". (R. 41, pp. 1-2, Pleading Vol. 1 of 1) The motion was presented to the district court on April 5, 1991. (R. 41, Pleading Vol. 1 of 1) On that date, Robert Pincham, Jr. appeared on behalf of appellants. The transcript reflects the following: (R. 49, pp. 2-4)

> "MR. PINCHAM: Good morning, your Honor, Robert Pincham, Jr., on behalf of plaintiffs.
>
> MR. SPITALLI: Your Honor, it has now been four months. The time has expired. We have gotten no response to our motion to dismiss. No requests for extension of time were timely filed. We heard the last time that Mr. Pincham, Sr. was ill. We are going to hear today that he has been busy. In the meantime, there are four lawyers who represent the plaintiffs in this case. This is a frivolous lawsuit. I think it is time it should be brought to an end.
>
> MR. PINCHAM: Well, let me start with the last point first, if I may. There is nothing whatsoever frivolous about our lawsuit. Clearly, there was a period of time when lead counsel on the case was ill. He came before the Court and made such representations to you. The matter was then set down for another date. As the Court is well aware, R. Eugene Pincham, Sr. has been very publicly involved in other activities in recent days. If the Court will allow me fourteen days, I will have a response in here.
>
> THE COURT: I will not do that. I will not do that. I will tell you why. The motion was filed in November. There was a substantial period of time within which to answer, I think, in January. There was no response filed and I extended the

time considerably in light of your father's situation, although there were other lawyers who could have worked on it. The answer was due March 1st?

MR. PINCHAM: That is correct.

* * *

THE COURT: It is now April 5th. Nothing has happened from March 1st to April 5th. I allowed an extraordinary amount of time to have this answered. The motion was filed four months ago. And I appreciate the fact that your father had some health problems, although obviously he has been restored to substantial health. I have the highest regard for your father as a trial lawyer – I tried a number of cases against him – but the judicial business has to have a place in life here; and, I think four months, in light of, I think, the substantial extension I have granted and in light of, basically, the deadline being ignored for – the last deadline being ignored for a period of essentially a month – is simply inexcusable – inexcusable. I do not do business that way and I think at this point in the game, the motion should be granted.

They are entitled to some consideration of their motion, which they filed and they took some time to do that. It is substantial. But we cannot, simply because there are other things that occupy people, in light of the substantial time I have allowed to file an answer to this motion, I just cannot and will not allow business to be conducted that way.

I am sorry about that and I do not mean to short-change anybody on the merits of this case, but if it was the first time, I would understand

> it. But it is the second time and after a substantial, substantial allowance of time. And then for no one to come in here, after the deadline has come and gone, and say, "I need more time, I am doing this" or "I am doing that," and with a number of other lawyers on the case who could have worked on this, who undoubtedly worked on preparing the complaint in the first instance, there is no excuse for that. The motion is granted."

The district court thereupon issued the following minute order and Judgment:

> "Defendants' motion for entry of an order granting motion to dismiss is granted. For the reasons stated in open Court this cause is hereby dismissed with prejudice. Ruling set for April 17, 1991 is stricken as moot. Final Judgment entered." (R. 43, Pleading Vol. 1 of 1)

> "It is Ordered and Adjudged that this cause of action is hereby dismissed with prejudice. Each party to take nothing. Final Judgment entered." (R. 42, Pleading Vol. 1 of 1)

On April 22, 1991, seventeen days later, appellants, through R. Eugene Pincham, Sr., filed a motion to vacate the judgment order of April 5, 1991 and for leave to file an answer and memorandum to the motion to dismiss. The transcript of April 22, 1991 reflects the following: (Supp. R. 58-5, pp. 2-5)

> "MR. PINCHAM: If the Court please, on the 5th of April your Honor entered an order dismissing the plaintiff's complaint because of the plaintiffs' failure to file an answer to the defendants' motion to dismiss. This matter before your Honor this morning is the plaintiffs'

motion to vacate that dismissal order of April 5th, to grant the defendant leave to file its affidavit of certification in support of the motion to dismiss, for leave to file its answer to the defendants' motion to dismiss and for leave to file an answer to the defendants' memorandum.

We have submitted written documents in support of the motion. The only thing that I would like to add or emphasize, one, the fact that we state in our motion that the defendants were not in any way prejudiced by their delay in our failure to file the answer to their motion to dismiss, and they do not allege any prejudice by our failure; and, secondly, that our failure was not willfull, but it was occasioned by the fact that I was engaged, as I state in the motion in recuperating and in campaigning for two particular offices.

I apologize to the Court and to counsel, but we very strongly urge that the defendants were not in any way prejudiced, that they don't claim to be prejudiced, that they should not receive a windfall because of the labors under which I was laboring.

Let me point out further to you that I am the only counsel in the case, and I am serving pro bono. The plaintiffs do have a good meritorious claim against the defendants, but we urge that this case should not be disposed of by a windfall based upon the facts and circumstances of this case and would ask your Honor to vacate this order of April 5th and deny the defendants' motion to dismiss because we do submit it is frivolous and without any merit whatever.

* * *

MR. SPITALLI: We pointed out the last time, your Honor, there are four lawyers involved here representing the plaintiffs in this case.

THE COURT: Have more than – are there not more appearances on file than yours, Mr. Pincham?

MR. PINCHAM: I don't think there are, but even if – I am reasonably positive, but they are merely – if they are, they were just merely there to help me because of the condition in which I was laboring at the time.

MR. SPITALLI: Four lawyers' names appear on this complaint, your Honor.

MR. PINCHAM: I am the only attorney in the case, Judge, and none of them have received one quarter or one dime, not one penny. More importantly –

THE COURT: We will take it up. I mean, whether they get paid or not is a different proposition –

MR. PINCHAM: I agree.

THE COURT: – from whether or not they have some responsibility to proceed with the case.

MR. SPITALLI: Your Honor, I think that the memorandum which Mr. Pincham seeks leave to file today underscores very dramatically that this case, as I indicated earlier, is frivolous. There isn't a single citation before you in that memorandum. That completely justifies, your Honor's dismissal of this matter with prejudice two weeks ago.

> Mr. Pincham files an affidavit in which he claims to be busy. He apparently has time for lots of other things except this lawsuit, including the filing of a second lawsuit in this court during the period in which he was involved in campaigning. This lawsuit is irresponsible, Judge, and should not have been filed and should not be left on file one more hour than necessary.
>
> THE COURT: Well, I think what I am going to do at this point is I would like to get any defendants' position in writing to the present motion to vacate. I do not know whether you have addressed whether even this motion is timely or not. I do not know whether it is or not. But, in any event, you can address that in your response, and I will give you a chance to reply."

Appellees' written objections to the motion to vacate were filed on April 26, 1991. The objections provide in pertinent part:

> "(c) No excusable neglect has been established under Rule 60(b). As mentioned earlier, four attorneys represent the plaintiff. None of them has ever withdrawn. On April 5, 1991, when this case was dismissed, Robert E. Pincham, Jr. appeared on behalf of plaintiffs. On April 22, 1991, when the motion to vacate was presented, R. Eugene Pincham, Sr. appeared on behalf of plaintiffs. While it was claimed for the first time by R. Eugene Pincham, Sr. that he, alone, represented the plaintiffs, his claim is contradicted: (i) by the record which demonstrates that four attorneys represent the plaintiff; (ii) by the envelopes in which the motion was served, which bear the name of Robert E. Pincham, Jr., Ltd. and (iii) by the fact that other attorneys, either

> Mr. Howse or Mr. Thomas, have appeared in open Court on this case. The only excuse offered by the plaintiffs is the apparent ill health and political activities of one of their attorneys, R. Eugene Pincham, Sr. No excuse is or has been offered by the remaining three attorneys. Further, the affidavit of R. Eugene Pincham, Sr. itself demonstrates the lameness of the excuse he offers. He claims he was discharged from Mercy Hospital for the last time on December 6, 1990 and was thereafter 'recuperating'. However, his affidavit goes on to recite that 'during his recuperation' and through February 26, 1991, he was assisting Danny Davis in the mayoral primary and then, apparently recuperated, ran for Mayor in the election held April 2, 1991. That scenario simply does not wash and fails to justify the utter and continual disregard of the Orders of this Court and the Federal Rules of Civil Procedure, by not only R. Eugene Pincham, Sr., but by the other three attorneys representing the plaintiffs as well."

Appellants did not contest any of the facts set forth in appellees' objections. Aside from rhetoric, the essence of appellants' response was:

> "We characterize the defendants' reliance on plaintiffs' delay in filing their answer to the defendants' motion to dismiss plaintiffs' complaint as trivia certainly not out of any disrespect by plaintiffs or their attorney for the Court rules, because had plaintiffs' attorney had the slightest notion that defendants would resort to such quibbling, he assures this Court that he would have prioritized his preferences differently and timely responded to the defendants' dismissal motion. Most assuredly, he would not

> have devoted his complete time and energies to recuperating and to Davis' and his campaigns for Mayor of the City of Chicago. We also assess the defendants' reliance on plaintiffs' delay in the case at bar as nitpicking because no harm or prejudice has thereby befallen them." (R. 50, p. 3, Pleading Vol. 1 of 1)

At no time did any of the other three attorneys representing appellants offer any reason for their continued failure to be responsive to the orders of the district court.

On July 12, 1991, the district court issued its Memorandum Opinion denying appellants' motion to vacate. The Memorandum Opinion provides in pertinent part: (Memorandum Opinion, App. 36-37)

> "The Seventh Circuit and courts of this district adhere to a policy favoring resolution of disputes on the merits. *Chandler Leasing Corp. v. UCC, Inc.*, 91 F.R.D. 81, 83 (N.D. Ill. 1981). The preference for meritorious resolution of disputes must, however, be balanced against the court's duty to protect and promote efficient litigation that will accrue to the benefit of all litigants. *See North Central Illinois Laborers' District Council v. S. J. Groves & Sons Company*, 842 F.2d 164, 167 (7th Cir. 1980); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984). To effectively perform this duty, courts have the inherent power to dismiss a case 'in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not'. *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983).
>
> Relief from a final order of dismissal may be obtained only upon a showing of exceptional

circumstances as defined by Rule 60(b), *Railroad Maintenance Laborers v. American Railroad Construction Co.*, 96 F.R.D. 433, 435 (7th Cir. 1985.)

* * *

Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the plaintiffs' three months to respond to the defendants' motion to dismiss. Finally, after a month of silence following the plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of 'mistake, surprise or excusable neglect'. The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied."